CHECK BEFORE FIXING!

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CHECK BEFORE FIXING! 2007 - 2008

BIMCO

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■ BIMCO is pleased to make the 2007/2008 edition of Check Before Fixing! available to you.

The 2007/2008 edition of Check Before Fixing! is aimed at making members more conscious of the necessity and benefits of cautious preparations before they commit themselves to a business undertaking.

The book does not claim to cover all the important areas, but aims at giving elementary general guidelines, not learned explanations on the intricacies of contract clauses. The BIMCO Secretariat knows that many costly complications are rooted in deviation from basic principles.

It is BIMCO's obligation to provide members with comprehensive information on risks and liabilities as background for reaching commercial decisions. An apparently sound commercial decision may prove disastrous due to a disregard of seemingly innocuous detail.

This is a quick reference manual when you are negotiating, and is intended to assist you in foreseeing, and therefore avoiding, pitfalls.

Check Before Fixing! is a tool in daily chartering and other shipping transactions - use it as a checklist.

Carsten Melchiors
Secretary General

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Voyage Chartering

Caution

Check and re-check on your contractual partner. Maritime fraud, bankruptcy, sharp practices are facts of life. Awareness of the dangers, education of staff, and making use of the BIMCO *Notices to Members* in good time are strong weapons in combating fraud.

Be aware that dealing with a letter-box company registered in a distant country can often result in a fiasco if things go wrong and it turns out that integrity is an unknown concept to that particular company.

How do you enforce payment if your contractual partner behind the company of which you know practically nothing does not fulfil his part of the contract, e.g. in respect of freight, deadfreight or demurrage, has no assets which could be secured and is domiciled in a country where arbitration awards are unenforceable and legal action complicated, time-consuming, costly and unrewarding? Problems can arise at any stage of the transaction; foresight and caution before entering into the contract are still the best ways to avoid trouble.

If, despite the above recommendations you find yourself in a situation where it seems impossible to obtain payment of an **undisputed** amount, or in the event that there is a failure to adhere to an arbitration award or even a judgement, members may approach the BIMCO Secretariat and request our intervention. Further comments on this service can be found in the section entitled "BIMCO's Benefits" on page 230.

Use of proper charter party forms

Use proper charter party forms for the particular voyage, bearing in mind that BIMCO has issued, revised and updated numerous charter parties with balanced terms.

If you cannot fix on these forms and for commercial considerations are forced to accept private forms, do compare parallel clauses in approved and private forms intended for the particular trade and you will see what the odds are in many situations - especially, but not only - in the event of strikes, war risks, trading to ice-bound areas and arbitration.

Be particularly cautious with innocently described forms, such as "Adapted GENCON" which, mercilessly mutilated through extensive deletions and substituted home-made clauses, leaves it with only the code-name intact! Members should realise that the use/acceptance of such forms is directly counter-productive to the following objectives of BIMCO:

> (c) To prepare and improve charter parties and other shipping documents and to do so whenever possible by means of friendly negotiation with charterers, shippers, merchants, receivers, shipowners, shipbrokers and others connected with the shipping industry or with organisations representing any such persons and to exhaust any reasonable means of agreement before issuing any forms for use by the shipping industry;
>
> (d) To issue as approved documents for the use of the shipping industry, charter parties and other shipping documents, and to adopt as approved documents for the like use, charter parties and other shipping documents which have been issued by similar organisations or agreed by representatives of the parties concerned;

(e) To meet and/or correspond with charterers, shippers, merchants, receivers, shipowners, shipbrokers, and others engaged in the shipping industry, and with representatives or organisations of any such persons, as to any matter connected with the shipping industry;

Why settle for one of the numerous versions of the Baltimore Berth Grain Charter Party with a maze of additional clauses when the NORGRAIN 1989 Charter, issued by the Association of Ship Brokers and Agents (U.S.A.) Inc., can be used? It is recommended by the North American Export Grain Association (NAEGA), BIMCO, the Chamber of Shipping and FONASBA. In co-operation with these organisations, it was drafted by a team of experts precisely for your benefit and is designed to replace the "Baltimore Form C" Charter.

What is the use of BIMCO employing its time and expertise in negotiation with merchants to create "agreed" charter parties if members then allow charterers to use their own - often appalling and confusing - terms under the respectable cover of e.g. the GENCON Charter (actually changed beyond recognition)? Most disputes arise under such privately "adapted" charters, with code names sounding familiar and acceptable. Use the publication *Forms of Approved Documents*, issued and regularly updated by BIMCO as a reference book. It contains a wealth of information and serves as a reliable standard for comparison purposes. Draft copies of the approved, recommended documents etc., can also be found on the BIMCO website at *www.bimco.org*

The need for unambiguous expressions and clauses

Hastily drafted clauses may turn out to be time-consuming and costly. The implications of unclear terms are shrouded in uncertainty. Arbitrators and sometimes lawyers thrive on the confusion created by such exotic terms as "per workable gang" (especially popular in the Mediterranean area) - should it be contrasted with an "idling gang"? Dictionaries reveal that a "gang" is a "company of workmen". Therefore: use standard expressions (e.g. "per hatch") and tested clauses which can be quantified in terms of money or time and leave no doubt as to their meaning.

In the same vein is the use of more or less exotic abbreviations. Some may argue that the use of abbreviations is time-honoured in shipping, dating back to when it really made a difference in communications costs whether the word was spelt out or whether a cryptic abbreviation was used. The days of the telegram are, however, gone and with modern technology, communication has become quite cheap. There is now even less reason to risk confusion and dispute by using abbreviations that may be misunderstood or misconstrued. The use of abbreviations should therefore be avoided.

In Bulletin No. 12 of January 1908, the Baltic and White Sea Conference, as it then was, reprinted an article from *Fairplay*, an extract from which states:

".....Another important point is the extermination of all the dirty and one-sided charter parties, charters that are grossly unfair to owners, charters that are ambiguous to such an extent that even the Club lawyers confess their inability to ascertain the correct meaning of half the clauses. We are certain that if the shipping trade could be conducted upon clear, honest, straightforward charter parties shipowners would not be one-half so unfortunate as they were last year. Why did they so badly? Because, as they admit, in every case

> detention was at the bottom of it. Is there any reason why this should continue, and in a more aggravated form this year, simply because owners are acting like a lot of children without a teacher? They want someone to show them how to make a charter protect them, for they suppliantly accept the charters in use today, bristling with traps in every clause and in many cases of the most atrocious character. Owners will not realise that charter conditions are as important as the rate of freight, for in no end of cases the conditions of charter at present nearly wipe out the freight altogether"

Harshly but candidly stated and, unfortunately, not entirely passé!

Is the charter party issued correctly?

Do check the recap message **before** signing or (if signed elsewhere by an authorised agent) immediately on receipt of the charter, check as to whether it correctly reflects what has been agreed, and protest/insist on corrections at once if necessary. Claims that mistakes have been made have much less impact if discovered at a later stage.

Representations in the charter party

Bear in mind that incorrect statements in the charter as to vessel's position (e.g. "expected ready to load"), deadweight cargo capacity, etc. may lead to claims and exposure to liability for damages incurred because of misrepresentation, or even to repudiation of the charter party.

Note that when a vessel is described in the contract as "expected ready to load by...." then the shipowner is under a firm obligation to commence the approach voyage in time so that - under normal circumstances - the vessel presents herself at the loading port by the date stated. If, however, the "expected ready to load" date was misrepresented, then owners may become liable for cargo storage expenses, demurrage on trucks, etc.

"Port" versus "Berth" charter

Do realise the distinction between, and implications of, a "berth" and "port" charter; unawareness of this distinction or absence of contractual countermeasures can be a costly affair.

Most charter parties issued by BIMCO contain waiting for berth clauses. The proper clauses can be found in the collection of clauses issued, supported or recommended by BIMCO.

In contrast, many private charter parties, or BIMCO forms mercilessly mutilated by charterers in their favour, do not contain such clauses, with the general result that idle time due to congestion falls within the owners' sphere of risk - often turning the voyage into a financial disaster.

In this respect, reading Clause 14 of "Shellvoy 3" can be instructive: "Whether or not the specified berth or other loading or discharging spot is available and accessible, if the vessel is nevertheless **ordered by charterers** to wait before proceeding thereto, laytime shall commence ....." (emphasis added).

Here is the catch: in many ports the **port authority** (and not the charterers) assigns the berth

or issues orders for waiting. In the same category are exceptions clauses which include provisions such as "obstructions ... in the docks". Such provisions may **destroy** the "whether in berth or not" stipulation.

Conclusion: be absolutely sure that the charter party covers you in case of congestion. See how this is covered in e.g. Clause 6 of the GENCON 1994, or in the WAITBERTH 2002 Clause recommended by BIMCO.

In the oil tanker trade preference should be given to the TANKERVOY 87 Charter which covers the question of congestion in a balanced manner. When private tanker charters have to be used, give preference to those which contain a "reachable berth warranty".

Geographical rotation

If several loading/discharging ports are stipulated, take care not only to state "in geographical rotation" but also "South to North", or as required. Without this addition you may be heading for a nice dispute! Be more specific than merely stating, e.g. "Scandinavia". You may find yourself arguing whether it includes Finland.

Description of cargo

Make sure that the cargo is described clearly, both in negotiations and in the charter party. Vague descriptions may produce unpleasant surprises. On the other hand, resist any attempt to define the cargo in the charter party (and later in the Bill of Lading) in a very detailed way, as the Master does not usually have the possibility to check whether the cargo actually corresponds to the description, whilst the Bill of Lading holder does not hesitate in lodging huge claims if the delivered cargo does not match the description e.g. "p.o.1071/tan flaked sulphur, irrevocable Credit No. .....".

Avoid agreeing to "about 10,000 tons". Question: in whose option and what margin does "about" imply? Aim at "10,000 tons 5 per cent. more or less in owners' option" instead.

There are often costly implications in acceptance of cargo "stowing .... cbft/ton without guarantee".

Laydays/cancelling

When stating layday/cancelling date, two aspects should be kept in mind - a) the contractual position if the vessel presents herself for loading too early, and b) the position if she cannot meet the cancelling date. Often it comes as a surprise that charterers are not inclined to count time used prior to commencement of the contractually first allowable moment, or that they are not inclined to reveal their intentions as to cancelling, or postponing the cancelling date, before the vessel arrives and tenders notice of readiness.

Adequate contractual solutions can be found, e.g. in Line 120 of Clause 6 of the GENCON 1994 edition in respect of the "prior time" used; in the CANCELCON 2002 Clause issued by BIMCO; in Clause 5 of BISCOILVOY 86 Charter, or in Clause 9 of the GENCON Charter in respect of charterers' option to cancel.

A minor point, but one leading to complications, is that of agreeing the date of the first layday and later discovering that it falls on the weekly day of rest or a holiday. Such expensive surprises can be easily avoided by reference to the *BIMCO Holiday Calendar* before agreeing the first layday.

Freight payment arrangements

Check carefully the diverse and often dangerous implications of freight payment clauses, such as basis for calculation (intaken, delivered quantity); time of payment ("on signing Bill of Lading", "on right and true delivery"); place of payment ("to .... for further remittance to owners" or "via ..."); currency of payment; fluctuations in rates of exchange, especially if the freight rate, payment of freight and the currency in the country of the recipient are different and/or if freight is not directly payable to his bank at the place of his domicile but is collected by an agent.

Learn to distinguish between straightforward freight payment clauses and clauses which will land you in trouble, affect your cash flow and subject you to losses due to revaluation, etc. See Clauses 15(a) and 15(b) in the COAL-OREVOY Charter and the "Currency Clause" in the collection of clauses recommended by BIMCO. Just how simply this can be done is exemplified by the first sentence of Clause 10(a) of CONLINEBILL 2000 which reads: "Freight, whether paid or not, shall be considered as fully earned upon loading and non-returnable in any event."

Demurrage

Keep in mind that the demurrage rate should be negotiated as shrewdly as the rate of freight. There are numerous examples of situations in which owners agreed to low demurrage in the hope of a fast turnaround (especially when payment of "half despatch" is part of the deal), only to see a protracted stay in port, or even that the charterers use the low rate for manipulation with the sequence of turn of vessels.

Do resist attempts to press you into agreeing to clauses providing "demurrage in discharging to be paid by receivers without any responsibility to charterers". How do you know that the receiver will feel bound by such a clause? What security for payment would you have? Is lien as security at all possible in the particular port? Keep in mind that agreement to payment of demurrage on owners' presentation of invoice with all supporting documents within, e.g. 30 days from completion of discharge often lands you in trouble. There are many examples of owners finding their demurrage claim time-barred under such clauses because of the impossibility of obtaining the Statement of Facts, etc. within the stipulated time.

Time bar clauses

Many contracts contain so-called time bar clauses, typically stipulating that all claims must be submitted within a period of 12 months from final discharge. Arbitration tribunals tend to construe such clauses quite strictly. Hence, if the owners have not been able to obtain, for example, a **signed** Statement of Facts or they are not able to obtain such a document in time to present their demurrage claim within the time bar set out in the particular clause, their claim for e.g. demurrage, which may be perfectly legitimate, will be time barred; owners will have

no possibility of obtaining payment from charterers. This problem is, of course, much worse if the time bar is, for instance, 90 days.

Despatch

As for despatch money: from cases submitted to the BIMCO Secretariat it appears that it comes as a surprise to many that agreement on payment of despatch money on "all time saved" can result in a situation in which the number of days on which despatch has to be paid exceeds the number of days agreed as laytime allowed. The reason is simple: the agreement implies that owners have to pay despatch money for all forward time saved (including weekends, holidays, etc.) during which the vessel would otherwise have to remain in port had the charterers utilised the full laytime allowed taking into consideration the incidence of all excepted periods. Conclusion: avoid the expression "on all time saved" and, if at all necessary, aim instead at "on laytime saved".

Notification of readiness/commencement of laytime

Beware of terms which impede the process of notification of readiness and, hence, commencement of laytime. Some classic examples: giving notice of readiness contractually allowed "whether in port or not ....." but "vessel to be in free pratique", "vessel also having been entered at Customs House" or "vessel's holds to be cleaned to charterers' inspector's satisfaction".

The point is that Customs Clearance cannot be obtained before vessel is at the berth. "Charterers' inspector" may not dream of inspecting vessel in the roads and he may be eager to disqualify the vessel after berthing. There are ports (e.g. in India) where customs entry procedures is a two-stage operation; vessel being granted "prior entry" on arrival followed by "final entry" at a later stage.

Another example (very popular for voyages to China) is the provision that notice of readiness can only be given once "Port Formalities" or "Joint Inspection" has been completed, all of which will be conducted only once vessel is at the berth. A balanced solution can be found in Clause 27(e) of the NUVOY-84 Charter reading:

> "(e) Waiting off port - if the notice of readiness as per Cl. 26'b' (Off port) has been tendered while the vessel was off the port, the laytime shall commence counting and shall count as if she were in berth.
>
> The time of shifting to the loading/discharging berth or to a waiting berth in port shall not count.
>
> After berthing, the actual time lost until the vessel is in fact ready in all respects to load/discharge (incl. customs clearance, and free pratique if applicable) shall not count as laytime or time on demurrage."

Have you not encountered a situation in which the charter provides for SHINC laytime and the vessel arrives on a Friday evening, or even worse before 2-3 days holiday, and only then you discover that, according to the charter party, notice of readiness can be given "within office hours" only? What about clauses insisting on a notice "in writing, whether in berth or not"?

In a similar category is the catch of laytime contractually beginning at 08.00 "after ship is reported during official hours only" - and these hours start at 08.00. Were "official hours" to commence at 09.00 then the notice time would be 23 hours. Is there no notice time in a case where "official hours" begin at 08.00 and notice is tendered at the stroke of this hour?

Problems may also be envisaged with laytime commencement provisions requiring that laytime is to commence "at the next regular working period commencing before 3 p.m.". This may result in somewhat protracted notice time in ports where there is only one "regular period" per day, or if the "next regular working period" only commences **after** 15.00 hrs. after vessel's arrival.

What if the notice of readiness is given at **noon sharp** when the charter party prescribes laytime commencement in the afternoon the same day or in the morning the following working day depending on whether the notice is tendered before or after noon? This problem has been solved in Clause 6(c) of GENCON 1994, which prescribes, *inter alia*, that:

> "Laytime for loading and discharging shall commence at 13.00 hours, if notice of readiness is given up to **and including** 12.00 hours, and at 06.00 hours next working day if notice given during office hours after 12.00 hours."

Laytime allowed

There is no substitute for fixed laytime (for instance, "2,500 metric tons per day loading") "Customary Quick Despatch" (CQD), "Custom of the port" (COP) and similar expressions all imply **undefined** laytime. The general implication is that the charterers can be expected to do no more than "their best" in the prevailing circumstances. If the charterers are able to distance themselves from the cause of the delay, they will not be liable for the delay. It must be realised that having agreed to undefined laytime, it will be quite difficult for the owners to establish laytime allowed and thus to formulate a demurrage or detention claim.

A loading or discharging rate "per hatch" is a better proposition than "per workable hatch" or "available workable hatch". It is recommended to ensure that the contract contains adequate stipulations regulating under which circumstances the weather exception may be invoked, in particular in situations where the ship has to wait for berth. A balanced solution can be found in:

GRAINCON Clause 19(d) reading:

> "In the event that the vessel is waiting for loading or discharging berth, no time is to be deducted during such period for reasons of weather unless the vessel occupying the loading or discharging berth in question is actually prevented from working due to weather conditions in which case time so lost is not to count."

An identical stipulation can be found in Clause 19(e) of the NORGRAIN 89 Charter and similar provision can be found in Clause 9(g) of the WORLDFOOD charter. Another solution appears in Clause 27(c) of the NUVOY-84 Charter which reads as follows:

> "(c) Weather hindrances. - Laytime shall not count when the loading/discharge of cargo into/from the Vessel under this Charter is actually prevented by adverse weather conditions."

It is important to realise the effect of different, yet commonly used, expressions related to laytime and to avoid expressions like "per workable gang" - the meaning of which is obscure even to those who invented it.

An example of a perfect dispute-breeder is the following expression: ".... cbm per biggest workable hatch per weather permitting working day of 24 consecutive hours". It has now been used for many years in charter parties covering carriage of timber to Egypt - causing confusion as to how it should be applied in practice, what to do with the quantity on deck, etc.

In one of the disputes, USD 110,000 in despatch money was at stake. There is little use in first accepting unknown, strange and untested expressions and thereafter seeking support for a favourable interpretation.

Don't tacitly agree to "reversible" laytime. In simple terms it means that charters have **an option** to make one "total" computation or two separate calculations - one for loading and another for discharging. "Averaging" implies, in short, that charterers are entitled to deduct, e.g. two days saved in loading (at e.g. USD 1,000 per day) from 4 days on demurrage (at USD 2,000 per day) in discharging and, hence, to pay solely for 2 days.

Recurring disputes concern large hatches in the context of laytime counting. The following part of Definition 5 of Voyage Charterparty Laytime Interpretation Rules 1993 offers an adequate solution **if incorporated in the charter party:** "a hatch that is capable of being worked by two gangs simultaneously shall be counted as two hatches".

Be on your guard if, under an "FIO Stowed Terms Charterparty", charterers insist on the following clause:

> "Stevedores although appointed by charterers, shippers or receivers or their agents to be under the direction and control of the captain, charterers, shippers or receivers shall not be responsible for the act and defaults of the stevedores at loading/discharging ports. All claims for damage allegedly caused by stevedores to be settled directly between owners and stevedores at loading/discharging ports. Master to notify stevedores of damage, if any, in writing within 24 hours after occurrence, otherwise stevedores not to be held liable."

The stevedores may often find protection under the "general terms" by which they work and may not be inclined either to repair the damage before vessel's departure, or to reimburse the cost of repair effected later on owner's orders.

Exceptions from laytime

Check these carefully and discover at the proper time - that is before acceptance - what kind of exceptions the charterers attempt to incorporate without attracting attention. An authentic example is "cargo to be loaded .... and to be discharged at the rate of 1,000 metric tons per working day, Saturdays, Sundays and holidays always excluded....".

Another clause states: "Time from 17.00 hours Fridays (or local equivalent) or day before holiday until 8 a.m. Monday (or local equivalent) or day following holiday not to count unless used ...".

Discharge is in an Islamic country - Question: how many days of the week count against laytime? Another point is that there is no need for agreement to exception of "local equivalent of 17.00 hours Friday" as in most Islamic countries both Wednesday and Thursday are normal working days! Avoid acceptance of seemingly clear terms in telegraphic style such as "Friday 5 p.m. clause". First clarify whether laytime will recommence to count on Monday 00.00 hrs or at 08.00 hrs.

There seems to be a growing trend to include reference to "super holidays" or even "special holidays" in laytime exception clauses. Adjectives such as "super" and "special" in the present context will cloud rather than clarify the issue. In this context, the following from the preface of the *BIMCO Holiday Calendar* is relevant:

> **"Super Holidays"**. BIMCO is not aware of a universally acknowledged definition of a "Super Holiday" and it is a term the implication of which may be obscure even to those who invented it. Hence, if it is at all necessary to agree to apply the term, we strongly recommend that parties aim to define exactly what days fall within the definition of "Super Holidays", but as a rule, the particular provisions should be avoided altogether. As far as BIMCO is concerned, a day is either a holiday or it is not a holiday and there is, in our view, no particular need for separating holidays into different categories.

General exceptions clauses

Many charter party forms contain a general exceptions clause in one form or another. Basically, there are two types; the ones that contain the provision "... or any other clause whatsoever beyond the control of the charterers" and the ones that contain the provision "... or any other clause beyond the control of the charterers".

Clauses of the latter type are construed according to the *ejusdem generis* rule of construction, the implication of which is that the particular event must either be an event as may be mentioned in the clause or the event must be in the same category.

Clauses of the former type will, however, be construed much wider. The word "whatsoever" effectively destroys the *ejusdem generis* rule of construction and charterers may rely on the clause to a much greater extent provided that they can show that the particular event is beyond their control.

Strike clauses

Be selective in the acceptance of strike clauses. It is recommended to compare strike clauses, for instance the "Centrocon Strike Clause" and "GENCON General Strike Clause". It must be kept in mind that the time lost owing to strike of stevedores will rest with the owners under the "Centrocon Strike Clause" and clauses similar to that clause, whereas the "GENCON General Strike Clause" offers a more balanced solution. There are, of course, other strike clauses offered and comparing the different clauses reveals best their disadvantages or advantages.

Statement of Facts

It is well established that laytime computations are issued on the basis of the information

contained in the Statement of Facts. Sometimes alien documents are introduced to support a position which cannot be sustained by the information contained in the Statement of Facts. This can be "weather reports" issued by the local authorities or Chamber of Commerce or, perhaps, a report from a meteorological station.

Although a Statement of Facts may not be perfect, it should still be considered the best contemporaneous evidence pertaining to the particular vessel's stay in port, particularly if the port agent ensures that the document has been signed by the relevant parties. Alien documents such as those briefly mentioned above should not, therefore, be taken at face value.

War clauses

Remember the war situation in the South Atlantic and in the Arabian Gulf in the 80s and again in the early 90s? Suddenly many owners found that it was a regrettable omission not to have proper war risk clauses in charters involving trading to these areas. You cannot foresee when/where similar situations may occur. Be prepared and always insist on the inclusion of **proper** war risks clauses, of which the VOYWAR 2004 is an example, and can be found in the collection of Clauses Issued, Supported or Recommended by BIMCO.

The Chamber of Shipping War Risk Clauses 1 & 2 are still being used. By now, they must be considered entirely inadequate and obsolete. The following is an excerpt from *BIMCO Special Circular* No. 9 of 21 November 1984, also contained in *BIMCO Bulletin* No. 6/84:

> **War Clauses**
> The Documentary Council was informed about the various warnings issued in recent BIMCO publications against obnoxious and obsolete war clauses, the use of which has escalated during recent months, *inter alia*, as a result of the escalation of war on shipping in the Persian Gulf.
>
> Attention has been called in particular to the out-dated Chamber of Shipping War Risks Clauses 1 & 2 which were drafted way back in 1935 in connection with the Spanish Civil War and which do not cover at all today's complex warlike situations. Moreover, experience has shown that the War Risks Clauses 1 & 2 are very often used in the wrong context in voyage charter parties and even in time charter parties which already contain adequate war clauses in the printed text. **On that background, the Documentary Council decided to withdraw the Chamber of Shipping War Risks Clauses 1 & 2** from the BIMCO Collection of Clauses.

These clauses should no longer be used!

Ice clauses

Do not ignore the dangers of winter navigation to icebound areas. The need for proper ice clauses in charter parties exists.

One should not lose sight of the obvious: the purpose of proper ice clauses is to prevent a situation in which owners and Masters are left with **no choice** but to attempt to proceed to the contractual destination, irrespective of ice conditions. The absence of such clauses in

contracts sets the scene for costly delays or ice damage repair bills. There are charter party forms which have no ice clause at all, e.g. the C. (Ore) 7, the use of which is certainly not confined to the Mediterranean. Ore can be carried under this charter party to destinations in e.g. the Lower Baltic which, in severe winter conditions, cannot easily be reached because of ice not only in the port but also *en route* to the destination.

The most suitable ice clause is the latest edition of BIMCO's free-standing **Ice Clause for Voyage Charter Parties**, reading:

> The Vessel shall not be obliged to force ice but, subject to the Owners' approval having due regard to its size, construction and class, may follow ice-breakers.
>
> **(a) Port of Loading**
> (i) If at any time after setting out on the approach voyage the Vessel's passage is impeded by ice, or if on arrival the loading port is inaccessible by reason of ice, the Master or Owners shall notify the Charterers thereof and request them to nominate a safe and accessible alternative port.
>
> If the Charterers fail within 48 running hours, Sundays and holidays included, to make such nomination or agree to reckon laytime as if the port named in the contract were accessible or declare that they cancel the Charter Party, the Owners shall have the option of cancelling the Charter Party. In the event of cancellation by either party, the Charterers shall compensate the Owners for all proven loss of earnings under this Charter Party.
>
> (ii) If at any loading port the Master considers that there is a danger of the Vessel being frozen in, and provided that the Master or Owners immediately notify the Charterers thereof, the Vessel may leave with cargo loaded on board and proceed to the nearest safe and ice free place and there await the Charterers' nomination of a safe and accessible alternative port within 24 running hours, Sundays and holidays excluded, of the Master's or Owners' notification. If the Charterers fail to nominate such alternative port, the vessel may proceed to any port(s), whether or not on the customary route for the chartered voyage, to complete with cargo for the Owners' account.*
>
> **(b) Port of Discharge**
> (i) If the voyage to the discharging port is impeded by ice, or if on arrival the discharging port is inaccessible by reason of ice, the Master or Owners shall notify the Charterers thereof. In such case, the Charterers shall have the option of keeping the Vessel waiting until the port is accessible against paying compensation in an amount equivalent to the rate of demurrage or of ordering the Vessel to a safe and accessible alternative port.
>
> If the Charterers fail to make such declaration within 48 running hours, Sundays and holidays included, of the Master or Owners having given notice to the Charterers, the Master may proceed without further notice to the nearest safe and accessible port and there discharge the cargo.
>
> (ii) If at any discharging port the Master considers that there is a danger of the Vessel being frozen in, and provided that the Master or Owners immediately notify the Charterers thereof, the Vessel may leave with cargo remaining on board and proceed to the near-

est safe and ice free place and there await the Charterers' nomination of a safe and accessible alternative port within 24 running hours, Sundays and holidays excluded, of the Master's or Owners' notification. If the Charterers fail to nominate such alternative port, the vessel may proceed to the nearest safe and accessible port and there discharge the remaining cargo.

(iii) On delivery of the cargo other than at the port(s) named in the contract, all conditions of the Bill of Lading shall apply and the Vessel shall receive the same freight as if discharge had been at the original port(s) of destination, except that if the distance of the substituted port(s) exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port(s) shall be increased proportionately.

* Note: In trades where the terms and conditions of the charter party are not incorporated into the bill(s) of lading, such bill(s) must contain an express statement permitting the vessel to complete with cargo at alternative port(s), whether or not on the customary route for the chartered voyage.

Other approved ice clauses are found in Charter Parties contained in the BIMCO *Forms of Approved Documents* binder, some of which are also available to members in the "Documents" section of the BIMCO website (*www.bimco.org*). Some additional pertinent comments to ice clauses can be found in the Ice database at *www.bimco.org*.

Profit not only from the recommendations made in BIMCO Bulletins, but also from the detailed information contained in the *BIMCO Ice Handbook* and from the up-to-date ice information provided via *www.bimco.org*.

Lien/Cesser clauses

Owners should not accept cesser clauses unless the particular charter party contains a satisfactory lien clause. Lien clauses are intended to give owners a remedy in case of non-payment of freight, deadfreight, demurrage. Therefore it should be remembered that such clauses are closely linked with freight payment clauses and demurrage payment clauses and should be viewed in this context.

These clauses fulfil the extremely important function of **contractual** access to security for payment, and any deletions or changes in the printed text of, e.g. Clause 8 of the GENCON diminish the security.

It is a fact of life that in many ports exercising lien on cargo may not be possible. Therefore, check **in advance** whether there would be a legal and practical possibility of placing the particular cargo into custody at the port of discharge. See the "Lien on Cargo" Chapter of this book.

Arbitration clauses

Attention is drawn to the BIMCO Standard Dispute Resolution Clause, which offers the user the choice of "English law/London arbitration", "U.S. law/New York arbitration" or "Law and Place of Arbitration as Agreed". These three clauses have been specifically designed for use both in charter parties and other forms of contract. In particular, the English law/London

arbitration clause has been developed in the light of the coming into force of the English Arbitration Act 1996. The clause was drafted in close co-operation with the London Maritime Arbitrators Association (LMAA) and incorporates the LMAA terms current at the time of the commencement of proceedings.

The Dispute Resolution Clause also contains a provision that allows the parties to refer all or part of their dispute to mediation. In order that one party may not use mediation as a delaying tactic, the clause requires that arbitration proceedings must already have been commenced prior to referral to mediation. In this way, should the mediation not be successful then the arbitration will proceed unaffected by the mediation procedure. While not all disputes lend themselves to resolution by mediation, BIMCO believes that mediation does offer a fast and cost effective dispute resolution method and a viable alternative to traditional arbitration.

So-called "protective clauses"

Who has not come across the mysterious phrase "otherwise usual protective clauses" during chartering negotiations? It is important to learn exactly why and in which form some of these clauses should be used and **why** some must be rejected.

It is incorrect to incorporate General Paramount Clause in a GENCON Charter as it **lessens** the protection otherwise given to owners in Clause 2 of this charter party. As already stated, the Chamber of Shipping War Risks Clauses 1 & 2 do not protect you at all **in today's realities;** they may breed an unjustified confidence in their effectiveness whilst actually giving none in times when sudden rocket attacks have replaced "blockading" of ports.

These clauses should **never, never** be used again.

"Additional clauses"

Be prudent and question the need to tack on to a charter party sponsored by BIMCO or other tested charter party forms, numerous additional clauses devised by charterers. Is their business so specific that it requires special terms, or is it their aim to change the printed text in their favour? How much would such clauses cost in terms of time and money?

Make it a habit to compare the proposed clauses with Clauses Issued, Supported or recommended by BIMCO or corresponding clauses in charter parties issued or recommended by BIMCO, i.e. compare stevedore damage clauses with e.g. Clause 12 of COAL-OREVOY Charter or with Stevedore Damage Clause for voyage charters. Similarly, compare grab discharge clauses with Grab Clause recommended by BIMCO, or with Clause 23 of MURMAPATIT Charter. Use of a recommended Cargo Handling Gear Clause may obviate disputes on this point.

Contracts of affreightment - bulk cargoes

The Secretariat is fairly often confronted with disputes in which parties have used e.g. the GENCON Charter as the contract document itself. Voyage charterparties are as a rule designed to cover single voyages and are, therefore, not designed to serve as contracts covering multiple shipments. The best solution is to have a steering-contract under which individual

charterparties may be issued covering the individual voyages thus enabling parties to clearly identify and separate the terms governing the contract itself as well as the individual voyages.

The GENCOA General Contract of Affreightment for the Transportation of Bulk Dry Cargoes obviates the need to devise "home-made" documents for fixtures of this kind. GENCOA can be found in BIMCO's *Forms of Approved Documents* binder and on the BIMCO website (*www.bimco.org*).

Bunkers

It is not unusual that bunkers supplied are sub-standard, but despite this, the owners are unable to succeed in a claim against the supplier, e.g. because of very wide exceptions of liability contained in the contract which the local suppliers use. BIMCO has developed a Standard Bunker Contract setting out more balanced terms addressing, for example, quality, sampling procedure, documentation, delivery as well as a dispute resolution clause.

Brokers

Brokers should adequately cover the question of their remuneration. It must be realised that there is no clear-cut basis for claiming commission e.g. in the case of non-performance, unless it has been expressly agreed.

In the handbook *Shipbrokers and the Law* by Mr. E.J. Edward, published by Brown, Son & Ferguson, Ltd., Glasgow, the following has been stated:

> "Contract in Express Terms. - In cases where a contract in express terms exists it is most important to keep in mind that it is that contract - and that contract only - which will govern the question of payment of remuneration. When the express terms of that contract have been proved the Courts will not admit evidence of any custom or usage, even of the profession, inconsistent with those terms in order to vary the contract."

On 29 May 1979 during the BIMCO General Meeting at Cannes, Mr. D. Charity, at that time with Messrs. Holman, Fenwick & Willan, London, delivered an excellent lecture entitled *Brokers' Legal Position towards Owners in respect of Commission for instance in the event of Cancellation, Breach of Contract, Non-Payment of Freight, Continuation of Time Charters, etc.*

Brokers will surely benefit from the following excerpts:

A quick survey of 9 other jurisdictions (other than English law, Ed.) shows that under the law of France, Denmark, Norway, Germany, Spain, America, Japan, Holland and South Africa there is no problem with privity of contract and the broker has a direct action on the contract. The law of Japan is particularly refined in this respect, since it declares that the broker can sue both parties to the contract which he has negotiated for them, and each party is liable for one half of the commission.

> **Rule 2**
> Commission clauses are strictly construed. It is very important for a broker who is negotiating a contract to be familiar with this rule because the remedy lies so easily in his own

hands. The rule is that commission is only payable on those amounts which are expressly set out in the commission clause.

and

Rule 3
Prima facie, commission is only due on sums actually paid under the contract. Supposing a broker expends a huge amount of time and trouble in negotiating a complex shipbuilding contract for 15 new buildings at a total cost of USD 100 million and that he is to get a commission of 2½ per cent., on which he confidently expects to retire and live a life of ease for the rest of his life. Suppose further that the day after the contract is all concluded, the parties enter into another agreement amounting to a mutual cancellation of the whole deal. What right does the broker have to his commission?

It seems that this question first arose in 1898. In *White v. Turnbull* (1898) 3 Com. Cas. 183 where there was a time charter for 12 months with a clause at the end "a commission of 5 per cent. on all hire earned to be paid to John White". (emphasis added)

and

It is clear then that if the broker wishes to protect himself against this sort of result he must ensure that the commission clause gives him brokerage - "on the estimated gross amount of hire to be paid under this contract" or some similar formula.

and

Some charters contain an express clause which sets out what is to happen in the event of the charter not being fully performed. An example is to be found in the BALTIME Form of Charter, which states:

"The owners to pay a commission of blank per cent. to the brokers on any hire paid under the charter, but in no case less than is necessary to cover the actual expenses of the brokers and a reasonable fee for their work. If the full hire is not paid owing to breach of charter by either of the parties the party liable therefore to indemnify the brokers against their loss of commission. Should the parties agree to cancel the charter the owners to indemnify the brokers against any loss of commission, but in such cases the commission not to exceed the brokerage on one year's hire."

Under this clause then if the charter is prematurely terminated by agreement, the brokers are entitled to a minimum of one years commission. If the charter is terminated because of a breach by one party, the party in default is liable to indemnify the broker for the loss of commission.

If the owners are in default, the charterers must recover this as a head of damages acting as trustee for the brokers, and vice versa; if it is the charterers that are in default, then the owners can sue as trustee for the brokers.

and

	Does the Broker have a direct action on the contract to recover commission?	Is commission payable in the event of cancellation?	Is commission payable in the event of repudiation by one party?	Is commission payable on extension or continuation of the contract?
English	The broker may sue under the "Rights of Third Parties" Act *	No	See note below (*)	No
French	Yes	Yes	Yes	No
German	Yes	Yes	Yes, by the defaulting party	Yes
Danish	Yes	Yes		No
Norwegian	Yes	Yes	Yes, by the defaulting party	No
Spanish	Yes	Yes		Only if expressly provided in original contract
American	Yes	No	No, unless innocent party "made whole"	No
Japanese	Yes, each party liable for half	Yes	Yes	No
Dutch	Yes		Yes	Yes, probably
S. African	Yes	Yes	Yes	No

** This Act was only introduced in 1999 and was therefore not in force when Mr. Charity made his comparison.*

Rule 4

Prima facie commission is not payable on any extension or continuation on the contract. This is very much a *prima facie* rule, because here the real answer will so often depend on the precise wording of the agreement. For example, if the original contract expressly provides for the possibility of an extension it is obvious that the right to commission

would continue if the extension comes about. The commission clause in the New York Produce Time Charter is a prime example of this, since it reads:

"A commission of 2½ per cent. is payable by the vessel and owners on hire earned and paid under this charter, and also upon any continuation or extension of this charter."

The different jurisdictions which I have researched are more or less divided on this question.

For example, French law is similar to English in saying that basically commission is not payable on a continuation of the original contract. Danish, Norwegian, New York and Japanese law come to the same conclusion. On the other hand, under German and Dutch law it seems that the Courts are more likely to hold that commission continues to be payable.

Port agents

At all times BIMCO supports port agents' requests for reasonably assessed advance funds for disbursement purposes. Port agents are entitled to security for payment!

At the same time, port agents must keep in mind that undue delay in returning unused balances, undocumented charges or, as sometimes happens, a long delay in submitting the disbursements account or Statement of Facts, reflects unfavourably on them. They should demand confirmation that the party contacting them is, in fact, acting as the Principals and thus liable for payment of disbursements.

The BIMCO Secretariat is repeatedly involved in intervention cases in which the party who, to all intents and purposes appears to be the port agent's Principals, says indignantly "Sorry - not us - we were only the agent," when the time comes to pay expenses which exceed the advance funds. Conversely, if the party asking the port agent to attend to the particular vessel is not the Principal (and hence not the payee of the disbursement) but merely acts "on behalf of", he should, in his own interest, clearly state so, as he may otherwise be held liable in any subsequent question of non-payment.

If the party asking the port agent to attend to the vessel is a member of BIMCO, this alone may influence the action or inaction of the port agent in respect of advance funds, expectation of prompt payment, etc.

The port agent will surely act differently and take precautions if he is told that the party is merely an intermediary, acting on behalf of a Principal expected to pay the disbursements account.

Use of Standard Time Sheets, Statement of Facts and Disbursements Accounts issued by BIMCO may make life easier for everyone concerned!

Port agents appointed by charterers

Basically, it is the shipowner's right to decide who should represent his interests and attend to his vessel at the particular port.

Commercial considerations often dictate that shipowners have to employ a port agent named

or “appointed” by charterers. The port agent so appointed should be fully aware that no matter what his connections with the charterers may be, he is the agent of the vessel and his duty is to represent/defend the interests of the shipowner.

The reality is, unfortunately, less ideal. Many charterers’ appointed agents, as illustrated by complaints received by the BIMCO Secretariat, feel that their first priority is to accommodate local shippers/receivers or charterers.

Those whose loyalties tend to be split when notifying vessel’s arrival/readiness or preparing Statement of Facts, and those who (even worse) ignore instructions, must be reminded that the foremost duty of port agents is to follow instructions received from their Principals i.e. the shipowners who pay for the port agents’ work - and that they can be held liable if they fail to act as instructed.

Time Chartering

"What do I know about my prospective business partner?" should be the crucial initial question.

Time charter employment has many pitfalls and at the outset considerations regarding the repute of the partner should take precedence over deliberations as to rate of hire, the charter party form and terms offered. There are time charterers who appear generous in negotiations but vanish once the first instalment of hire has been paid and the vessel has cargo on board with "freight prepaid" Bills of Lading.

The BIMCO Secretariat was involved in the following case, which is a classic example of just how far awry a fixture can go. A vessel was time chartered for a trip from Antwerp to Karachi and Bombay. When the vessel reached Port Said, only two instalments of hire and bunkers on delivery had been paid. The charterers neither supplied bunkers for continuation of the voyage, nor paid Canal dues and, in effect, ended their contractual involvement.

Because of owners' Bill of Lading liability (most Bills of Lading were signed "freight prepaid"), the owners had to continue the voyage and deliver the cargo to the Bill of Lading holders. Owners' gross loss was estimated at about USD 1,109,000, composed of unpaid hire, bunkers, discharging costs, Suez Canal dues and port expenses.

On page 187 of BIMCO's Monthly Circular for August, 1912, the following note appeared: **When fixing on time make sure that charterers are A.1.**

This has not lost its actuality and brokers should not be indifferent about whom they represent. Their reputation may be irreparably tarnished if time charterers for whom they act turn out to be rogues, and brokers may become apprehensive on knowing that, as recently as March 1985, in the *Arta* case, the Court of Appeal, London, had to judge "whether brokers negligently misstated financial standing and reliability of charterers - whether owners could recover from brokers".

Putting up a performance guarantee may be an alternative. BIMCO has drafted a **Personal Guarantee** and **Ordinary Guarantee** to be issued by the guarantor. The texts of these can be found in the *Forms of Approved Documents* binder and on the BIMCO website (*www.bimco.org*).

Broker-members of BIMCO should keep in mind that they have special commitments and standards to live up to and would be well-advised to check thoroughly on the credentials, financial position and viability of the Principals whom they represent in fixtures.

It is almost routine in cases of intervention by the BIMCO Secretariat on behalf of its members that when it comes to honouring an arbitration award directing payment of a substantial amount to a BIMCO member, there seems to be no life (and certainly no managers anywhere) behind the facade of a bogus company which is suddenly reduced to no more than a P.O. Box Number in an exotic country. The persons concerned may already be starting a new company somewhere else.

Use BIMCO's *Notices to Members*, make thorough enquiries through the broker as to whether the time charterers are known to him as "first class", ask for charterers' bank references and check with your own bank connections. There is simply no substitute for business prudence

and, unfortunately, cases are known of new fixtures with parties earlier reported in the BIMCO *Notices to Members*, which are available to all members on the BIMCO website at *www.bimco.org*. Do realise that in time chartering, the integrity of your business partner is the crucial part of the deal!

Time charter party forms

For dry cargo trade, preference should be given to BALTIME 1939 (as revised 2001), GENTIME or "NYPE 93". The latter represents a general revision of the NYPE 1946 by The Association of Ship Brokers & Agents (U.S.A.) Inc., (ASBA), New York in co-operation with BIMCO and the Federation of National Associations of Ship Brokers and Agents (FONASBA). Introductory notes to GENTIME can be found on the BIMCO website (*www.bimco.org*).

For oil tanker trade give preference to "Intertanktime 80" or, alternatively, the BPTIME 3 form as approved by BIMCO and bear in mind that BIMCO has introduced time charter forms for special trades: SUPPLYTIME 2005 for off-shore service vessels and GASTIME for vessels carrying liquefied gas. BIMCHEMTIME 2005 should be used for time chartering of vessels carrying chemicals in bulk. BARECON 2001, also issued by BIMCO, is to be used for bareboat chartering of commissioned vessels or newbuilding financed by mortgage. Support these documents by recommendation to Principals and by using them!

Term of hire

Depending on the market conditions, one of the parties may be interested either in terminating the charter party as soon as possible, or in having the vessel employed under the charter party for as long as possible. This, and vague provisions as to the duration, are at the root of many disputes. If time is of the essence, then clear provisions like "12 months" or "redelivery between 15-30 September" or "minimum 40 maximum 42 months" preclude any speculative moves in a subsequently changed market. Margins like "about ....", long under/overlaps and an option to add "off-hire" periods, obviously give charterers room to manoeuvre.

An authentic example of a dispute-breeder: "6/6 months, 2 months more or less in charterers' option". The query was: would this mean that the charter party could be terminated after 4 months, or is the margin applicable only to the second term of 6 months?

A source of many disputes: an agreement to a trip/time charter, e.g. "about 150 days **without guarantee**". Shipowners who wish to avoid unpleasant surprises must be more specific when stipulating the earliest/latest redelivery dates for the vessel, for instance by a **fixed** margin such as "15 days more or less in charterers' option".

Trading limits

Here again, aim at precise statements. "Baltic in season" may mean different things to different people. Needless to say, it always seems perfectly clear on fixing - the doubts arise during the performance of the time charter.

In early 2000 the Institute Warranty Limits were revised and with effect from 1 November 2003, these limits are now known as International Navigating Limits (INL).

"Navigating Limits
Unless and to the extent otherwise agreed by the underwriters in accordance with, the vessel shall not enter, navigate or remain in the areas specified below at any time or, where applicable, between the dates specified below (both days inclusive):

Area 1 - Arctic
(a) North of 70° N. Lat.
(b) Barents Sea
Except for calls at Kola Bay, Murmansk or any port or place in Norway, provided that the vessel does not enter, navigate or remain North of 72° 30' N. Lat. or East of 35° E. Long.

Area 2 - Northern Seas
(a) White Sea.
(b) Chukchi Sea.

Area 3 - Baltic
(a) Gulf of Bothnia North of a line between Umea (63° 50' N. Lat.) and Vasa (63° 06' N. Lat.) between 10 December and 25 May.
(b) Where the vessel is equal to or less than 90,000 DWT, Gulf of Finland East of 28° 45' E. Long. between 15 December and 15 May.
(c) Vessels greater than 90,000 DWT may not enter, navigate or remain in the Gulf of Finland east of 28° 45' E. Long. at any time.
(d) Gulf of Bothnia, Gulf of Finland and adjacent waters North of 59° 24' N. Lat. between 8 January and 5 May, except for calls at Stockholm, Tallinn or Helsinki.
(e) Gulf of Riga and adjacent waters East of 22° E. Long. and South of 59° N. Lat. between 28 December and 5 May.

Area 4 - Greenland
Greenland territorial waters.

Area 5 - North America (East)
(a) North of 52° 10' N. Lat. and between 50° W. Long. and 100° W. Long.
(b) Gulf of St. Lawrence, St. Lawrence River and its tributaries (East of Les Escoumins), Strait of Belle Isle (West of Belle Isle), Cabot Strait (West of a line between Cape Ray and Cape North) and Strait of Canso (north of the Canso Causeway), between 21 December and 30 April.
(c) St. Lawrence River and its tributaries (West of Les Escoumins) between 1 December and 30 April.
(d) St. Lawrence Seaway.
(e) Great Lakes.

Area 6 - North America (West)
(a) North of 54° 30' N. Lat. and between 100° W. Long. and 170° W. Long.
(b) Any port of place in the Queen Charlotte Islands or the Aleutian Islands.

Area 7 - Southern Ocean
South of 50° S. Lat. except within the triangular area formed by rhumb lines drawn between the following points:

(a) 50° S. Lat.; 50° W. Long.
(b) 57° S. Lat.; 67° 30' W. Long.
(c) 50° S Lat.; 160° W. Long.

Area 8 - Kerguelen/Crozet
Territorial waters of Kerguelen Islands and Crozet Islands.

Area 9 - East Asia
(a) Sea of Okhotsk North of 55° N. Lat. and East of 140° E. Long. between 1 November and 1 June.
(b) Sea of Okhotsk North of 53° N. Lat. and West of 140° E. Long. between 1 November and 1 June.
(c) East Asian waters North of 46° N. Lat. and West of the Kurile Islands and West of the Kamchatka Peninsula between 1 December and 1 May.

Area 10 - Bering Sea
Bering Sea except on through voyages and provided that
(a) Vessel does not enter, navigate or remain North of 54° 30' N. Lat.; and
(b) The vessel enters and exits West of Buldir Island or through the Amchitka, Amukta or Unimak passes; and
(c) The vessel is equipped and properly fitted with two independent marine radar sets, a global positioning system receiver (or Loran-C radio positioning receiver), a radio transceiver and GMDSS, a weather facsimile recorder (or alternative equipment for the receipt of weather and routing information) and a gyrocompass, in each case to be fully operational and manned by qualified personnel; and
(d) The vessel is in possession of appropriate navigational charts corrected up to date, sailing directions and pilot books.

Keep in mind that consent to charterers' request to break INL may result not only in damage to vessel but also in idle time during repair periods.

Places of delivery/redelivery

A difficult subject but, still, parties should aim at defining these points clearly and check in advance whether the contractual arrangement matches the actual conditions.

"On arrival pilot station..." causes no problems where the location of this point in relation to the particular port can be defined. There are, however, approaches to ports (e.g. Antwerp) where, depending on the route of access taken by the vessel, the pilot boards at one of two or more places.

Be especially careful in defining delivery/re-delivery points in Japan where pilotage is a complex operation. Where would "pilot station New Orleans" be, as agreed in one of the dispute cases handled by the BIMCO Secretariat? "On dropping outward pilot" causes difficulties in the case where there is a two/three stage port/river non-compulsory pilotage.

Agreeing to "Delivery TIP" (taking inward pilot) should be avoided as it is a potential dispute breeder. Who should absorb the delay if weather conditions prevent the pilot from boarding the vessel, perhaps for several days?

"South coast of ....." or "South Japan" should be questioned before accepting and not when the parties start to have widely different views on its limits and whether a particular port is within the limits. Redelivery range "Japan/Colombo including Indonesia/Philippines" seems clear to the parties when they sign the charter party. When the time for redelivery comes, there may be a dispute as to whether ports on the mainland between India and Korea are included.

Redelivery "Mediterranean not East of Cape Passero" also has its surprises, as can be seen on page 127.

Geographical ranges

Frequently causes problems because although a particular range, for instance, "Continent" may appear reasonably straight forward still, parties may differ as to exactly which area is encompassed in this range. BIMCO has devised a set of **Definitions of Geographical Ranges** which, when incorporated in the particular Charter should minimise the risk of becoming entangled in disputes on this point:

"Scandinavia"
shall mean ports or places situated in Norway, Denmark, Sweden and Finland, including islands within the Baltic Sea.

"Baltic"
shall mean ports or places situated in the Baltic and adjacent waters south of a line drawn from Falsterbo to the 55 deg. latitude on the east coast of Moen, following the 55 deg. latitude west to the east coast of Jutland.

"U.K."
shall mean ports or places situated in Great Britain and Northern Ireland.

"Continent"
shall mean ports or places situated on the Coast of the European Continent, from Hamburg in the north to Bordeaux in the south, both inclusive, also including Rouen.

"A.R.A." ("Amsterdam - Rotterdam - Antwerp")
shall mean the ports of Amsterdam, Rotterdam and Antwerp.

"Skaw/Cape Passero"
shall mean ports or places situated on the Coast of the European Continent, including Rouen, from Skaw in the north to Cape Passero in the south east, Cape Passero being the easternmost point, thus including Western Mediterranean ports, Balearics, Sardinia, Corsica and Malta, but excluding the North African Coast and the Adriatic Sea.

"Mediterranean"
shall mean ports or places situated in the Mediterranean Sea, from the Strait of Gibraltar in the west to the Dardanelles in the north east, thus including the Adriatic Sea and the Aegean Sea, but excluding the Suez Canal. The dividing line in the west shall be a line drawn from Gibraltar in the north to Ceuta in the south, both inclusive. The dividing line in the north east shall be the western entrance to the Dardanelles.

"West Med." ("West Mediterranean")
shall mean ports or places situated in the Mediterranean Sea, from the Strait of Gibraltar in the west to Cape Passero in the east. The dividing line in the west shall be a line drawn from Gibraltar in the north to Ceuta in the south, both inclusive. The dividing line in the east shall be a line drawn from Cape Passero in the north to, and excluding, Misurata in the south, thus including the north coast and the south west coast of Sicily.

"East Med." ("East Mediterranean")
shall mean ports or places Situated in the Mediterranean Sea, from Cape Passero in the west to the Dardanelles in the north east. The dividing line in the west shall be a line drawn from Cape Passero in the north to, and including, Misurata in the south, thus including the east coast of Sicily and the Adriatic Sea. The dividing line in the north east shall be the western entrance to the Dardanelles, thus including the Aegean Sea.

"West Coast Africa"
shall mean ports or places situated on the West Coast of Africa, from Dakar in the north to Douala in the south, both inclusive, including Fernando Po, but excluding Cape Verde Islands.

"East Coast Africa"
shall mean ports or places situated on the East Coast of Africa, from Cape Guardafui in the north to, and including. Maputo in the south, including Zanzibar.

"Southern Africa"
shall mean ports or places situated on the South Coast of Africa, from Maputo in the east to Lüderitz in the west, both exclusive.

"Red Sea"
shall mean ports or places situated in the Red Sea, from Suez in the north to the Strait of Bab el Mandeb in the south, thus including the Gulf of Suez and the Gulf of Aqaba.

"PG" ("Persian Gulf") or "AG" ("Arabian Gulf")
shall mean ports or places situated in the Persian (Arabian) Gulf, including Shatt Al Arab, not above Basrah. The dividing line in the south shall be a line drawn from, and including, Bandar Abbas to the northernmost point of the Musandam Peninsula.

"West Coast India"
shall mean ports or places situated on the West Coast of India, from, and including, Kandla in the north to Cape Comorin in the south.

"East Coast India"
shall mean ports or places situated on the East Coast of India, from, and including, Calcutta in the north to Cape Comorin in the south, excluding Sri Lanka.

"Far East"
shall mean ports or places situated on the Mainland Coast, from Myanmar in the south west up to, and including, Vostochny in the north east, thus including Singapore and including the whole of Japan, The Philippines, China (Taipei), Malaysia, Brunei, Indonesia and Papua New Guinea.

"Singapore/Japan"
shall mean ports or places situated in the Far East, from Singapore in the south through the South China Sea to Japan in the north, thus including Singapore, The Philippines, China (Taipei) and the whole of Japan, but excluding Mainland ports, Malaysia, Brunei, Indonesia and Papua New Guinea.

"ECCAN" ("East Coast Canada")
shall mean ports or places on the East Coast of Canada situated on the Coast facing the Bay of Fundy, the Atlantic Ocean, the St. Lawrence River not above Montreal, and the Gulf of St. Lawrence from, and including, Battle Harbour in the north to Oak Bay in the south, also including Anticosti, Prince Edward, Magdalen, Cape Breton and New Fbundland.

"USNH" ("United States North of Hatteras")
shall mean ports or places situated on the United States' East Coast, from Cape Hatteras in the south up to, and including, Calais in the north, including Chesapeake Bay, Delaware Bay, the Delaware River not above Philadelphia and the Hudson River not above Albany.

"USEC" ("United States' East Coast)
shall mean ports or places situated on the United States' East Coast from Miami in the south to Calais in the north, both inclusive, including Chesapeake Bay, Delaware Bay the Delaware River not above Philadelphia and the Hudson River not above Albany.

"USNOPAC" ("United States' North Pacific Coast")
shall mean ports or places situated on the United States' North Pacific Coast, from Brookings in the south to Blaine in the north, both inclusive, including the Columbia and Willamette Rivers and Puget Sound.

"USPAC" ("United States' Pacific Coast")
shall mean ports or places situated on the United States Pacific Coast, from San Diego in the south to Blaine in the north, both inclusive, including the San Francisco Bay Area, the Columbia and Willamette Rivers and Puget Sound.

"U.S. Gulf"
shall mean ports or places in the United States situated on the Coast facing the Gulf of Mexico, from Key West in the east to, and including, Brownsville in the west, including the Mississippi River not above Baton Rouge.

"ECCA" ("East Coast Central America")
shall mean ports or places in Belize, Guatemala, Honduras, Nicaragua, Costa Rica and Panama situated on the East Coast facing the Caribbean Sea, including the Panama Canal.

"WCCA" ("West Coast Central America")
shall mean ports or places in Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama situated on the Pacific Coast, including the Panama Canal.

"Caribs" ("Caribbean Sea")
shall mean ports or places situated on Cayman, Jamaica, Haiti, Dominican Republic, Puerto Rico, Virgin, Leeward, Windward and Barbados.

"West Indies"
shall mean ports or places situated on Cuba, Pinos, Bahamas, Great Inagua, Turks and Caicos.

"NCSA" ("North Coast South America")
shall mean ports or places situated on the North Coast of South America, from Turbo in the west to Georgetown in the east. both inclusive, including the Orinoco River not above Matanzas and including Lake Maracaibo and Aruba, Curacao Bonaire, Margarita, Trinidad and Tobago.

"ECSA" ("East Coast South America")
shall mean ports or places situated On the East Coast Of South America, from, and including. Georgetown in the north to Punta Dungeness in the south, including the Amazon River not above Macapa, the River Plate, the River Parana not above San Lorenzo and the Uruguay River not above Fray Bentos.

"WCSA" ("West Coast South America")
shall mean ports or places situated on the South American Pacific Coast, from Jurado in the north to Punta Arenas the south, both inclusive.

Time of delivery/redelivery

A source of many disputes. The only sure way to avoid them is to stipulate in the charter party whether UTC (Universal Time Co-ordinated) or local times should apply.

On/off-hire survey

Clauses like:

> "Owners and charterers are to hold a joint on-hire and off-hire survey for joint account, on-hire survey to be on owners' time and off-hire survey to be on charterers' time. The cost of such survey to be equally shared by owners and charterers. On-hire survey to be held at first loadport and off-hire survey to be held at last port of discharge."

do not cover all aspects. A preferable clause would be:

> "The owners shall bear all expenses of the on-survey including loss of time, if any, and the charterers shall bear all expenses of the off-survey including loss of time, if any, at the rate of hire per day or pro rata, ...".

Or, alternatively, the solution found in Clause 5 of the GENTIME, the salient part of which reads:

> "Joint on-hire and off-hire surveys shall be conducted by mutually acceptable surveyors at ports or places to be agreed. The on-hire survey shall be conducted without loss of time to the Charterers, whereas the off-hire survey shall be conducted in the Charterers' time. Survey fees and expenses shall be shared equally between the Owner and the Charterer.

Both the above provisions ensure that it is only in the event of loss of time solely because of the on-hire survey that the time charterers are entitled to off-hire the vessel.

Description of vessel, speed & bunker consumption warranties

The connection between the above factors and the rate of hire does not need to be emphasised. What should be emphasised is that breach of these warranties or misrepresentation of vessel's particulars account for the majority of disputes under time charter.

Conclusion: over-optimistic speed/consumption warranties, acceptance of stringent modifications like "average service speed" especially in a long-term time charter, or careless description of vessels particulars will be skilfully exploited by time charterers; therefore, be on your guard when (a) giving the warranties or (b) on acceptance of stringent speed warranties contractually linked with reduction of hire, such as can be found in tanker time charter parties.

Charterers to provide

Often charterers insist on the statement "whilst on hire" to precede the printed text of Clause 4 of BALTIME 1939. Be distrustful of the consequences of acceptance. The addition of the words "customary" or "compulsory" before the word "pilotage" in the printed text of Clause 7 of the NYPE 93 Time Charter has been bitterly regretted by many owners who had to pay for non-compulsory, but highly recommendable, pilotage themselves, e.g. when passing Bosporus on frequent trips to and from the Black Sea.

"Customary" has uncertain implications as views may differ as to what is customary in a certain area, period and size of vessel, and it is not easy to find any authorities on "customs" of this kind.

Similarly, beware of changes in the printed text of Clause 8 of the NYPE Charterparty so as to read "Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing security, dunnaging, unlashing, discharging, and tallying at their risk and expense, under the supervision **and responsibility** of the Master." This will affect the Inter-Club agreement and there are judgements to the effect that this addition (inserted in Clause 8 of the NYPE 1946) will saddle the shipowner with the consequences of any negligence (be it in respect of damage to cargo or to the ship) on the part of the stevedores who are, basically, the servants of the charterers.

Concession to charterers in this respect during chartering negotiation stage can be extremely costly to owners during performance of the charter party, as illustrated by three British judgements: *The Argonaut, The Shinjitsu Maru No. 5, The Alexandros P.*

Broadly speaking, it may be said that the conclusion which can be drawn from these three judgements is that the responsibility for damage to cargo and/or vessel will rest with the owners whenever the words "and responsibility" are inserted in clause 8 of the NYPE Charterparty unless owners can successfully demonstrate that active intervention by time charterers themselves caused the damage.

Garbage dues for time charterers' account

At various ports charges are levied against vessels for removal of garbage by special garbage boats coming alongside the vessel, the charges being made according to fixed tariffs. Disputes

have sometimes arisen between shipowners and time charterers as to who should bear these expenses under the time charter.

The opinion of BIMCO is that the charges made for removal of garbage must be regarded as port charges, and under the BALTIME 1939 Charter they should be borne by the time charterers. This point is specifically addressed in Clause 13 of GENTIME and Clause 16(b) of BOXTIME 2004.

The BALTIME 1939 Charter in clause 4 stipulates that the time charterers are to pay for *"... all ... port charges ... boatage ... and all other charges and expenses whatsoever ..."*.

In the GENTIME the salient provision in clause 13 reads: *"The charterers shall ... pay ... All port charges (including compulsory charges for ... garbage removal ..."*.

Apart from the formal position according to the text of the charterparties, it should not be overlooked that the garbage service includes not only the removal of rubbish from the galley but also waste and sweepings from the cargo holds and from the deck.

Quantity, price of bunkers on delivery/redelivery

Home-made clauses intended to cover these matters result in a multitude of disputes when the time comes to test them or when attempts are made to capitalise on the loopholes in them. Why not simply use the printed text of Clause 5 of BALTIME 1939, Clause 9 of the "NYPE 93" Charter, or Clause 6(a) of GENTIME.

Quality of bunkers

Attention is drawn to the Bunker Quality Control Clause for Time chartering and to the International Chamber of Shipping (ICS) Recommended Bunker Delivery Note. For single copies of the latter, as well as larger supplies, members should contact the International Chamber of Shipping in London (Carthusian Court, 12 Carthusian Street, London EC1M 6EZ, United Kingdom).

Cargo liability

Resist attempts to incorporate a General Paramount Clause in a BALTIME 1939 Charter. Under this charter party owners are better protected by the printed text of Clauses 9 and 12. See Clauses 17 and 18 of the GENTIME. Clause 27 of NYPE 93 prescribes that cargo claims are to be settled in accordance with the Inter-Club agreement.

Change of destination stated in Bills of Lading

Owners/Masters of time chartered vessels should be most careful in accepting time charterers' orders to proceed to a different destination than stated in the Bill of Lading. Owners should always consult their P&I Club before - if at all - accepting such orders, so as to safeguard owners interests properly (bank guarantees approved by the Club) in case of claims from Bill of Lading holders. The Club should invariably be contacted when time charterers insist on delivery of cargo although the original Bill of Lading cannot be presented.

Non-payment of hire

From the "Lien on Cargo" section of this book, it follows that clauses purporting to give owners of a time-chartered vessel a right to lien on cargo, are of little practical assistance. The following points may serve as a check-list or reminder to members whenever they are confronted with late or non-payment of hire. Use the BIMCO *Notices to Members* at an early stage!

(i) Due care must be taken to notify clearly the time charterers of withdrawal and to instruct the Master immediately.

(ii) Leniency in accepting late hire payments has the effect that before contemplating withdrawal of vessel, owners must place time charterers on notice well in advance that late payment of next hire instalment will not be accepted.

(iii) The owners' bank must be instructed to reject any late payment of hire.

(iv) Withdrawal of vessel with cargo on board is not possible because of owners' responsibility vis à vis Bill of Lading holders.

(v) Lien on cargo is possible only in the rare cases when the cargo belongs to the time charterers, i.e., when Bill of Lading holders and time charterers are identical.

(vi) Consult owners' P&I/Defence Club with a view to attempting to place lien on voyage sub-freights or Bill of Lading freight (unless prepaid).

(vii) Consult owners' P&I/Defence Club with a view to undertaking steps aimed at securing time charterers assets, if any.

(viii) First and last, act in full co-operation with P&I/Defence Club as soon as hire problems may arise and furnish the Club with the necessary documentation.

It may also be of some interest to members to call attention to the possibility of suspension of service which is a novelty in time chartering and which may go a long way towards protecting the owners, although it does not cover all situations such as, for instance, when the vessel is on a sea passage with cargo on board. The concept of suspension of service was introduced in GASTIME Charter, Clause 10 of which reads:

> "The charterers shall pay the hire at the rate stated in Box 20 from the time the vessel is delivered to the charterers until her redelivery to the owners.
>
> Payment of hire shall be made in cash in full and without discount, per calendar month in advance, in the manner described in Box 21. If hire or any instalment thereof is not paid as aforesaid, the charterers shall pay interest at the rate of 0.1 per cent. per day on the amount outstanding from and including the due date until the date of payment.
>
> In default of punctual and regular payment as herein specified, the owners may require the charterers to make payment of the amount due within 96 hours of receipt of notification from the owners; failing which the owners will have the right to withdraw the vessel

without prejudice to any claim the owners may have against the charterers under this charter. Further, so long as the hire remains unpaid the owners shall be entitled to suspend the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof in respect of which the charterers hereby indemnify the owners and hire shall continue to accrue and any extra expenses resulting from such suspension shall be for the charterers' account. Should the vessel be on her voyage towards the port of redelivery at the time a payment of hire becomes due, said payment shall be made for such length of time as the owners or their agents and the charterers or their agents may agree upon as the estimated time necessary to complete the voyage less disbursements arranged by the charterers for the owners' account, and when the vessel is redelivered to the owners any difference shall be refunded to or paid by the charterers as the case may require, but not later than three months after the redelivery of the vessel."

Similar provisions can be found in clause 8 of GENTIME and Clause 11 of NYPE 93. In the event that the owners suspend services under the "NYPE 1946", the charter party comes to an end; owners' action will terminate the contract. The advantage of the temporary suspension of services provision is that in the event that owners apply their contractual right to suspend services temporarily, the contract will remain alive and this may be the better alternative in the particular circumstances (owners still have the right to withdraw the vessel) rather than terminating the contract. In other words, owners essentially have an option whether to terminate the contract (observing the notification etc. requirements contained in the contract) or whether temporarily to suspend services.

Arrest of vessels for time charterers' debts

To diminish the danger of arrest of vessels for debts incurred by time charterers, use the following disclaimers, irrespective of the trading pattern and ports visited by the vessel.

'A'
(To be signed by owners or their agents and posted by registered letter, return receipt requested, addressed to all of the charterers' known stevedores, suppliers of fuel and other necessaries or services at the prospective ports of call.)

"Dear Sirs,
(date)

We have recently chartered our (nationality) flag (type) vessel named the (name) to Messrs. (name) of (place) as charterers.

It has come to our attention that in your capacity of (type of furnisher) at the port(s) of (name of port) where our said vessel may be trading, you may be called upon by said charterers to furnish (type of supplies or services) for their use in connection with the vessel.

We wish to advise for your guidance that under the terms of the charter between us, as owners of said vessel, and said charterers, neither the charterers nor the Master nor any other person has power or authority to pledge either our or our said vessels credit, or to create, or permit to be created, any liens on our said vessel, and that accordingly any such

(type of supplies or services) furnished by you to our said vessel will be so furnished solely upon the credit of Messrs. (name) as charterers, and not on the credit of the vessel or ourselves as her owners". (signed)

Clause 'B'
(To be endorsed as a prominent and legible rubber or typed stamped legend by the Master, Chief Officer, Chief Engineer and all other ship's officers signing receipts or other papers submitted by suppliers of fuel, stevedoring and other necessaries or services which are not, under the governing charter, ordered for the account of the owners.)

'Important Notice'
The goods and/or services being hereby acknowledged, receipted for, and/or ordered are being accepted and/or ordered solely for the account of charterers of the S/S/M/S ..... and not for the account of said vessel or her owners. Accordingly, no lien or other claim against said vessel or her owners can arise therefor.

(name) OWNERS OF THE (type) VESSEL (name).

Clause 'C'
(Suggested form of the last two sentences of Clause 18 of NYPE 1946 or equivalent clause in other time charters, of Time Charter, underscored language is the proposed addition to the form.)

"Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel. In no event shall charterers procure, or permit to be procured, for the vessel, any supplies, necessaries or services without previously obtaining a statement signed by an authorised representative of the furnisher thereof, acknowledging that such supplies, necessaries or services are being furnished on the credit of charterers and not on the credit of the vessel or of her owners, and that the furnisher claims no maritime lien on the vessel therefor."

War clauses and ice clauses

Insufficient attention to these clauses at the negotiation stage means that you may discover too late that there is no alternative but to follow time charterers' orders of employment which brings the vessel into a dangerous zone, or compels her to navigate in ice. There may be a link between this insufficient attention to "some bits of printed paper" and loss of or damage to the vessel.

Beware of attempts to incorporate the Chamber of Shipping War Risks Clauses 1 and 2 in a time charter party. These clauses engender unjustified confidence, and yet it must be kept in mind that not only are they obsolete and have been withdrawn by the Documentary Committee of BIMCO, but they should never, never find their way into a time charter party. Remember that the NYPE 1946 Time Charter has no war risks clause at all, and the use of this charter should be discontinued in favour of its successor, the "NYPE 93".

The most extensive war risks clause for time chartering is BIMCO Standard War Risks Clause for Time Charters 2004 - Code Name: CONWARTIME 2004 as, above all, this clause entitles owners to decline orders of employment which would bring the vessel into a dangerous zone

and, obviously, the right to decide whether to accept or reject an order of employment which would bring the vessel into a dangerous zone, should not be easily relinquished.

Acceptance of clauses like the following in private oil tanker charter parties entails high risks and added expense.

> "For the purposes of this clause it shall be unreasonable for owner to withhold consent to any voyage, route or port of loading or discharge if insurance against all risks defined in Article 21(a) is then available commercially or under a Government program in respect of such voyage, route or port of loading or discharge. If such consent is given by owner, charterer will pay the provable additional cost of insuring vessel against hull war risks in an amount equal to the value under her ordinary hull policy but not exceeding..."

It is important to ensure that the war clauses in the charter party are not at odds with the war clauses in the Bills of Lading signed by the Master of a time chartered vessel.

Be most meticulous in seeking the advice of professionals when taking out war risks cover. You must know exactly what you obtain for your money, and whether you get coverage in excess of what is in any case covered by owners' basic war and hull insurance.

Costly gaps in the cover and subsequent disputes with the insurers where millions of dollars were at stake, have been reported in recent years.

In respect of ice, it may be observed that most time charter parties provide for trading within Institute Warranties Limits (which will probably gradually change to International Navigation Limits - INL) which mostly concern winter conditions.

The most suitable ice clause is the latest edition of BIMCO's free-standing **Ice Clause for Time Charter Parties** reading:

> (a) The Vessel shall not be obliged to force ice but, subject to the Owners' prior approval having due regard to its size, construction and class, may follow ice-breakers.
>
> (b) The Vessel shall not be required to enter or remain in any icebound port or area, nor any port or area where lights, lightships, markers or buoys have been or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Master's sole discretion, a risk that, in the ordinary course of events, the Vessel will not be able safely to enter and remain at the port or area or to depart after completion of loading or discharging. If, on account of ice, the Master in his sole discretion considers it unsafe to proceed to, enter or remain at the place of loading or discharging for fear of the Vessel being frozen in and/or damaged, he shall be at liberty to sail to the nearest ice-free and safe place and there await the Charterers' instructions.
>
> (c) Any delay or deviation caused by or resulting from ice shall be for the Charterers' account and the Vessel shall remain on-hire.
>
> (d) Any additional premiums and/or calls required by the Vessel's underwriters due to the Vessel entering or remaining in any icebound port or area, shall be for the Charterers' account.

Other approved ice clauses are found in Charter Parties contained in the BIMCO *Forms of Approved Documents* binder, some of which are also available to members in the "Documents" section of the BIMCO website (*www.bimco.org*). Some additional pertinent comments to ice clauses can be found in the Ice database at *www.bimco.org*.

Profit not only from the recommendations made in BIMCO Bulletins, but also from the detailed information contained in the *BIMCO Ice Handbook* and from the up-to-date ice information provided via *www.bimco.org.*

Redelivery "in like good order"

The BIMCO Secretariat has been involved in many cases which illustrate that agreement to a lumpsum payment in lieu of cleaning holds, etc. on redelivery, as a rule, works out to shipowners' disadvantage.

It is simply impossible to envisage how costly an affair it will be (for instance, when last cargo under the time charter was coal or cement, etc. and vessel has to prepare her holds for grain, or if the cargo required the use of extensive quantities of dunnage and such, dunnage must immediately be removed from the port area).

Another matter is that there are ports with no or inadequate reception facilities for tank washing, or even cargo hold washing, and with the ever-increasing environmental awareness, owners will have no possibility to discharge these slops at sea. The vessel, therefore, would have to be ordered to a port having adequate reception facilities, even if this would mean substantial deviation.

Therefore, leaving the duty to redeliver the vessel "in like good order" as delivered to the time charterers, is the best solution.

Booking Note

Use of Booking Notes, generally speaking, causes no problems if they are used as intended - in the liner trade. Outside this trade, the use of Booking Notes, more often than not, results in complications. Therefore, think twice before you decide on the CONLINEBOOKING for a casual fixture.

It is important to note that CONLINEBOOKING 2000 contains the following provision:

> "It is hereby agreed that this contract shall be performed subject to the terms contained on page 1 and 2 hereof which shall prevail over any previous arrangements and which shall in turn be superseded (except as to deadfreight) by the terms of the Bill of Lading."

and the Bill of Lading referred to is BIMCO's liner bill of lading, CONLINEBILL 2000, the use of which is made compulsory.

There are many examples of how the remedies offered carriers in Clause 9 and especially Clause 14 of the CONLINEBOOKING 2000 have surprised the unwary consignee, who reacts strongly when casual carriers invoke these clauses, although conditions at destination may not have changed since the Booking Note was signed.

Sketchy, home-made "Booking Notes" proclaiming "otherwise GENCON terms" are dispute-breeders. Why not use the GENCON Charter in the first place?

Above all, make sure you know the consequences of accepting "liner terms". This expression has different implications and financial consequences at different ports and in different trades. The following explanation, aptly describing the vagueness of the expression can be found in the handbook *Chartering and Shipping Terms* by J. Bes:

> "Berth terms or liner terms. This expression is used for shipments under a charter party, the principal terms of which correspond with the regular terms for shipment of the commodity concerned by the regular lines operating in the particular trade. The expressions "berth terms" or "liner terms" do not exclude special conditions as to rate of loading or discharging - generally speaking, this term implies that loading and discharging expenses will be for shipowner's account."

Contrast this with Clause 9 of CONLINEBOOKING 2000 which offers a clear division of expenses connected with cargo operations. Learn from Clauses 3, 13 and 15 of this document how the provisions of the General Paramount Clause, Both to Blame Collision Clause and the Himalaya Clause are properly used in a document which, on page 1, repeats the terms of the CONLINEBILL 2000 Bill of Lading.

Bill of Lading

Unfortunately, the importance of this document is not sufficiently appreciated by many who are involved in its handling. This is at the root of numerous, costly mishaps and only constant efforts aimed at increasing awareness of all the potential pitfalls can lead to improvements.

Preferably, only one original Bill of Lading for a particular shipment should be in circulation. Issuance of two or three originals increases the danger of fraudulent manipulation. Masters should be instructed not to sign "duplicates". Remember that the word "duplicate", according to *The Shorter Oxford English Dictionary,* (1973 edition, published by the Oxford University Press, Oxford) means:

"One of two things exactly alike, so that one is the double of the other" and "a thing which is the exact double of another reckoned the original" and "a second copy of a letter or official document, having the legal force of the original".

Cases are known in which the delivery of oil cargoes was demanded against presentation of a "duplicate" Bill of Lading.

The use of non-negotiable **Sea-Waybills** should be promoted in trades where there is no requirement to issue negotiable Bills of Lading. BIMCO introduced the "BIMCO Blank Back Form of Non-Negotiable Liner Waybill" in 1980 and the general background of this document was explained as follows in the introductory notes on page 5599 of BIMCO Bulletin III-1980:

> The basic difference between a Waybill and a Bill of Lading is that a Waybill is not a negotiable document. Apart from this being stated in the title of the document, it is also clearly spelled out in the third paragraph of the Incorporation Clause stating, *inter alia*, that
>
> "This Liner Waybill which is not a document of title to the goods..... "
>
> This means that it need not be presented at the port of destination as a condition for receiving the goods. Without waiting for the document to arrive, the goods will be delivered by the carrier to the party named as consignee in the Waybill on production of proof of identity by the consignee or its authorised agent without any documentary formalities. This is clearly stated in the BIMCO Waybill as follows:
>
> "The goods shipped under this Liner Waybill will be delivered to the party named as consignee or its authorised agent, on production of proof of identity without any documentary formalities."
>
> It therefore also follows that a liner Waybill should not be issued "to order" and the relevant fill-in box on the face of the BIMCO Liner Waybill makes this clear in the guide text in the following manner "consignee (not to order)".
>
> The procedure is simple and particularly attractive when the seller and the buyer are well-established trading partners and when there is one sale only with no intention of further on-sales of the goods.

In 1986 the GENWAYBILL was introduced for use in the short-sea dry cargo trade. The Document was revised in 1995 to make it subject to the CMI Uniform Rules for Sea Waybills as adopted by the Comité Maritime International at its Paris meeting in 1990 in order to remedy the lack of international governing rules for sea waybills. Notes explaining the revision can be found on pages 49-50 of BIMCO Bulletin 3/96 and on the BIMCO website *www.bimco.org*

To encourage the use of sea waybills further, also in the liner trade, BIMCO issued a general liner sea waybill in 1998 code named LINEWAYBILL. This document has been developed in its own right as the non-negotiable equivalent to the CONLINEBILL. Like the CONLINEBILL therefore, although mainly designed for port-to-port shipments, it can also be used as a through transport document. (Notes explaining the basic features of the LINEWAYBILL can be found on pages 70-73 of BIMCO Bulletin 2/98).

For the oil tanker trade, there is the "Tankwaybill 81" produced by INTERTANKO and adopted by BIMCO, and for use in the LPG trade the GASTANKWAYBILL was introduced in 1988.

Many charter parties prescribe the use of a specific Bill of Lading form. The CONGENBILL Bill of Lading is intended for use under charter parties which do not prescribe the use of a specific Bill of Lading. However, the 1994 edition of the GENCON Charter does prescribe that the 1994 edition of the CONGENBILL is to be used. On the other hand, the CONLINEBILL should never be used under a charter party, e.g. under GENCON Charter. The terms of the two documents are incompatible. Yet, unfortunately it is done and, of course, results in complications and disputes.

For multimodal transport, BIMCO has developed documents specifically addressing the intricacies of this particular kind of carriage. The aim of this type of transport document is to cover all modes of transport on an equal level. Nevertheless, it has now and then proved necessary to deal particularly with the sea leg. There are two main reasons for this. Firstly, on this leg there is usually a most serious accumulation of risks as, for instance, many hundreds of containers being carried on board one and the same ship. Secondly, maritime liability differs from all the other liability systems in transportation law insofar as nautical error and fire are accepted as excuses, a basic fact also for the insurance cover.

For multimodal modal transport BIMCO recommends the use of the COMBICONBILL Combined Transport Bill of Lading, as revised 1995, or, altenatively, the MULTIDOC 95 Multimodal Transport Bill of Lading (formerly "Combidoc"). The COMBICONBILL is based on the Hague and Hague-Visby Rules and it is advised that preference is given to the use of this document since the MULTIDOC 95" is based on the new UNCTAD/ICC Rules which do contain a few elements which could be said to be less favourable than the Hague and Hague-Visby Rules.

In line with BIMCO's policy to advise members to use non-negotiable documents whenever there is no specific need for a bill of lading, the COMBICONBILL and the MULTIDOC 95 have also been developed in non-negotiable forms clearly cross stamped "Non-negotiable". Both forms have been made subject to the CMI Uniform Rules for Sea Waybills. For explanatory notes to these documents please refer to pages 21-25 and 30-33 of BIMCO Bulletin 1/96 or the BIMCO website at *www.bimco.org*.

It is advisable to make sure that a Bill of Lading to be issued with charter parties does provide

for a proper incorporation clause making the Bill of Lading subject to the terms of the voyage charter party with which it is to be used. An example of an adequate incorporation is:

> "All terms and conditions, liberties and exceptions of the charter party, dated as overleaf, including the Law and Arbitration Clause (Clause ...) are hereby expressly incorporated. If this Bill of Lading covers a transport for which no charter party has been agreed, the terms of the ... charter shall be deemed to be incorporated in this Bill of Lading."

Reference to sales contracts, Letters of Credit, etc., in the Bill of Lading can have costly consequences. Reject them! Instruct Masters accordingly! Example: because of such a reference in the Bill of Lading, a carrier was held liable for about GBP 1,000,000 where package limitation under the Hague Rules would have been less than GBP 5,000. Therefore:

- resist requests for references to sales contracts, etc., being included in the Bill of Lading, and

- if unavoidable, insist upon ad valorem freight in such cases.

When time charterers or port agents are given authority to issue and sign Bills of Lading on Owners'/Master's behalf, clear written instructions should be given that such Bills of Lading must not include any references to invoice value, sales contract, or a bank Letter of Credit, etc., and that otherwise the time charterers or port agent shall remain responsible for all increased liability arising therefrom. Nonetheless, a far better solution is to avoid giving authorisation to sign Bills of Lading and to brief the Master on why such inconspicuous references in the Bill of Lading must be avoided. This is especially relevant in the case of cargoes destined for Egypt and Turkey, where cases of such increased liability have been reported. However, the possibility of the same situation arising in other countries cannot be excluded.

As previously stated, authorisation to sign and release Bills of Lading should not be given lightly. Be particularly careful if the port agent is not acting exclusively for the owners and where a collision of interests may arise. Owners sometimes land themselves in serious difficulties as a consequence of such authorisation.

This is exemplified by the *Nogar Marin* case and also by the *Nea Tyhi* case: Bills of Lading for a plywood parcel were issued by the charterers' agent and claused "shipped under deck". In fact the plywood was loaded on deck. It was damaged by rainwater during the voyage and the Bill of Lading holder sued the owners for GBP 15,280. The charter party contained the following clause:

> "The charterers hereby agree to indemnify the owners against all consequences of liabilities that may arise from the charterers or their agents including the Master signing Bills of Lading .... inconsistent with the charter ...."

The shipowners denied liability on the grounds that the charterers' agent had no authority to issue Bills of Lading claused "shipped under deck". The Court held, *inter alia*:

> "... in any event the charterers' agents had no actual authority to issue and sign these Bills of Lading.

(3) where a Bill of Lading was issued stating that goods were shipped under deck when they were in fact shipped on deck there was no reason for the shipper to know that there was an erroneous statement in the Bill of Lading; and if a choice had to be made whether the shipowner should be the loser or the endorsee of a Bill of Lading should be the loser, there was more reason that he who contracted with the charterer and put trust and confidence in him to the extent of authorising the charterers' agents to issue and sign Bills of Lading should be the loser than a stranger; and here the charterers' agents had ostensible authority to sign the Bills on behalf of the Master; that signature bound the defendants as Principals to the contract contained in or evidenced by the Bills of Lading and the defendants were liable to the plaintiffs for breach of that contract.

(4) since the Bills of Lading incorporated The Hague Rules and art, IV, r. 5, limited the defendants' liability to GBP 100 per package or unit and there were 140 crates of plywood, the defendants' liability would be limited to GBP 14,000."

The following example illustrates the need for caution on the part of the Master when signing Bills of Lading: three vessels belonging to the same owners were fixed to carry general cargo from the Continent to a port in Turkey. The charter party contained the following clause:

"Master to authorise the charterers or their agents in writing to sign bladings on his behalf in accordance with mate's receipt."

Actually, in all three cases the Bills of Lading were presented to the Master, who signed them. The Bills of Lading contained the following statement: "freight prepaid upto fot Teheran". Charterers had paid the sea freight for all three cargoes, but had arranged for on carriage in only one case and thereafter disappeared into the blue. The shipowner was compelled to arrange and pay for on carriage of the two remaining cargoes to the final destination, i.e. Teheran.

Reject requests for a too-detailed description of the cargo unless you have adequate means (e.g. a test or certificate from an independent laboratory) to ascertain that the cargo matches the description.

Avoid being involved in fraudulent acts disguised as routine procedure. The following excerpt from a maritime law book *A Handy Book for Shipowners and Masters* by M.R. Holman, should suffice to explain the position:

"A Master is sometimes pressed by a shipper to sign Bills of Lading, which are known to be false in some particular, in return for the shipper giving him a Letter of Indemnity, or 'back letter' as it is sometimes called. A Master should never consent to such an arrangement for, since it is generally intended to cover a commonplace fraud, the shipowner will not be able to recover under the indemnity."

Needless to say, antedating a Bill of Lading at the request of charterers or shippers is a fraudulent act and cases are known in which owners have exposed themselves to huge claims as a result of such a conspiracy. Vessels have been arrested when consignees discovered that, actually, the cargo was loaded in a different port than the one stated in the Bill of Lading.

Would you give a receipt for money not actually received? If not, then why **again and again** are "freight prepaid" Bills of Lading signed and released before freight is paid and, in some cases, never paid (e.g. due to bankruptcy)?

It is amazing how many, in spite of numerous warnings, ignore basic prudence and fall into the old-fashioned trap of a request for a "freight prepaid" Bill of Lading with the promise to pay later. Two related aspects are: (a) there is no right to lien on cargo in respect of freight if the Bill of Lading functions as a receipt for freight; (b) more often than not there are troubles and no watertight solution if the freight has not been paid concurrently with signing of the "freight prepaid" Bill of Lading.

Clause 4(b) of GENCON 1994 makes it a term of the contract that owners are not required to issue "freight prepaid" bills of lading unless the freight has actually been paid.

Imagine this situation: the charter party provides for the Bill of Lading so marked, the vessel completes loading late in the evening in a distant port and the Master has no confirmation from owners that freight has been paid. The shipper is pressing for release of the Bill of Lading, the Master wants to start the voyage without delay and depositing the Bill of Lading with the port agent pending confirmation that freight has been received appears to be the solution. Not quite; first of all cases are known where the charterers' appointed agent disregarded owner's/Master's instructions, and moreover it must be kept in mind that the Hague Rules provide:

> "After receiving the goods into his charge, the carrier shall, on demand of the shipper, issue to the shipper a Bill of Lading .....".

Therefore "depositing" the Bill of Lading may not always work, but it must be stressed that the obligation to give the shipper a Bill of Lading is one thing; another is that no-one can expect the "freight prepaid" statement in the Bill of Lading without actually prepaying the freight. Therefore owners must consequently and decisively warn merchants/charterers in advance that no "freight prepaid" Bill of Lading will be issued unless payment is prepared (notwithstanding non-banking "days" etc.) in good time and effected in exchange for the Bill of Lading so claused.

There is no reason why shipowners should become victims of merchants' unwillingness or of merchants' problems in organising matters so that releasing of a "freight prepaid" Bill of Lading is made possible on completion of loading.

Deck cargo

Cargo can be carried on deck solely when the shipowners/carriers are expressly authorised by their contractual partners, e.g. in the charter party or Bill of Lading, to load on deck.

It is advisable to clause the Bill of Lading as follows whenever deck cargo is carried:

> "Agreed to be shipped on deck at charterers', shippers' and receivers' risk and responsibility for loss, damage or expense howsoever caused"

or, as in the CONGENBILL Bill of Lading:

"(of which .... on deck at shipper's risk; the carrier not being responsible for loss or damage howsoever arising)"

Clean Bills of Lading

Do not agree to issuing clean Bills of Lading against acceptance of a so-called "Letter of Indemnity" if condition of goods, packing or other details in the Bill of Lading (e.g. date of port of shipment) dictate otherwise.

It must be realised that issuance of a "clean" Bill of Lading in these circumstances would be a fraudulent act (conspiracy against the unwary subsequent holder of the Bill of Lading) and that the "Letter of Indemnity" is in effect not worth the paper it is written on; it is unenforceable. Additionally, the owners will have no P&I cover in such situations.

No delivery of cargo without presentation of originals

Owners/Masters and their port agents must fully realise that delivery of cargo without presentation of original Bills of Lading may have disastrous consequences. Do not rely on routine or past experience of "so far, all has gone OK". If the cargo is delivered to the wrong party, owners are exposed to claims which may exceed the value of the cargo.

The basics are explained more vividly in a Letter to the Editor which appeared on page 37 of *Fairplay* of 4 February, l982, than in many dry text books:

"A Bill of Lading is like a cheque, only whereas a cheque represents cash, a Bill of Lading represents goods, thus the same criteria apply. Where the Bill/cheque is made out to a named consignee/beneficiary, delivery/payment is made to that named consignee/beneficiary upon surrender/presentation of the Bill/cheque by him to the carrier/bank, or alternatively to his order or in accordance with his endorsement which may be specific (i.e. to a named person) or open (i.e. a blank endorsement)."

Remember that delay in discharging (leaving aside the fact that time should count against charterers) is by far the lesser evil compared with the prospect of a claim for non-delivery of a valuable cargo to its rightful consignee.

There is no reason why the shipowner should be expected to take great financial risks because of malfunctions (delays in transmitting documents) in the commercial part of the transaction.

Bear in mind the basic rule that unless this is specifically catered for, the Master is not obliged to deliver cargo without production of the original Bill of Lading, nor are the owners compelled to deliver cargo against a Letter of Indemnity merely because one is offered. Hence, if the owners do decide to deliver the cargo against a Letter of Indemnity, this is a **commercial decision**.

Although the P&I Clubs have assisted their members by proposing Letters of Indemnity against delivery of cargo in the absence of the original Bill of Lading, worded with a view to covering their members best possible, it must however be realised that such Letters of Indemnity are substitutes for P&I cover, i.e. the owners will be without cover in such situations.

Caution with storage of Bills of Lading forms

Easy access to blank Bill of Lading forms (carrying the printed name of reputable liner companies) stored in shipping offices was at the root of a few forgeries committed by unscrupulous rogues implicating the unwary carrier. Keep this in mind!

Worth Knowing

Voyage charters

Voyage charter - loading one port 1-3 berths Columbia River District

Enquiry: A vessel was fixed for loading at "one port, 1-3 safe berths Columbia River District including Portland". Charterers nominated Portland and Longview. Owners objected. Port agent nominated by charterers referred to "custom" according to which "Columbia River is considered as one port including 8 grain elevators from Astoria to Portland". BIMCO's comments were requested by our member.

Reply: "By no stretch of imagination would we consider 'Columbia River' as a port and all the loading places situated on the river as 'berths' within the port. It would indeed be a long port with some days steaming between the berths. As far as BIMCO is concerned, we would say that Longview is one port and Portland another port (and hence the nomination is in contravention of the 'one port' agreement)."

In brief, BIMCO found support for the above opinion in the summary of a recent British judgement which is reproduced below with the kind permission of the publishers Lloyd's of London Press Limited:

"Vessel calling at three places in Columbia River - Whether 'ports' or 'berths'

Clause 1 of the charterparty provided:

> 'That the said vessel... shall... proceed to one, two, three, or four safe ports, one or two safe berths, each in the US North Pacific (Columbia River District, including Portland and Puget Sound District) at charterer's option, and there load... a full and complete cargo... of wheat ...in bulk...'

The vessel in fact sailed only into the Columbia River. She called at three places there, namely the elevator terminals at Portland, Kalama and Longview. Wheat was loaded at each of those places. The distance from Portland to Kalama was about 50 miles and the distance from Kalama to Longview was about 12 miles.

The issue was whether those three place were, in effect, berths within one single port (as the owners argued), or whether they were three separate ports (as the charterers contended). The vessel had in fact called at two berths at Portland and one berth each at the other places. The owners submitted that the vessel had called at four berths at one port and claimed to recover shifting expenses in respect of the two additional 'berths'.

The umpire decided in favour of the owners and awarded them USD 21,453 as load port shifting expenses. He considered that the charterparty terms were not clear and that he was therefore entitled to refer to the customs of the trade. The umpire was much influenced by a document headed *Customs of the Port - Columbia River District - Astoria, Oregon/Kalama, Washington*. The document was published by the Merchants Exchange of Portland, Oregon, and included the following extract:

> 'These customs are applicable to vessels loading in the Columbia River District, which shall be considered as one port and includes grain berths from Astoria ...to Portland, including Longview, Kalama and Vancouver...'

The charterers appealed. **Held**, that the relevant principles were laid down in *Sailing-Ship "Garston" Co v Hickie & Co* (1885) 15 QBD 580, where the Court of Appeal said:

> 'The word "port" in a charterparty is to be understood in its popular, or business, or commercial sense. It does not in such a document necessarily mean the ports as defined for revenue or pilotage purposes.'

As a matter of construction, it was inconceivable that the parties in the present case intended the three separate loading places, between them over 60 miles apart on the river, to be one single port. To compare those places with a huge river conurbation like London or New York was not a true comparison. Each of the places of call was plainly a different port within the meaning of that word in the charterparty and not just a different berth. The construction was quite plain. Since the terms of the charterparty were clear, the umpire should not have paid any heed to the document emanating from local merchants in the Columbia River area. Accordingly, the appeal would be allowed and the owner's claim for USD 21,453 as load port shifting expenses deleted from the Award."

Needless to say, the owners were informed of this judgement so as to strengthen their position in the dispute with charterers.

Dockage dues at Los Angeles - "Warshipoilvoy" charter

Enquiry: Owners maintained that according to the "Warshipoilvoy" Charter Party such dockage charges should be for the account of the charterers, on whose behalf the following argument was advanced:

" ... All expenses levied against the vessel for reason of her normal port operations are for the account of owners and all charges levied on the basis of the cargo are for account of the charterers."

Reply: The Secretariat was asked to express its opinion and replied on 19 April, 1985, that:

"Clause 12 of the above charterparty explicitly provides that 'The vessel shall be free of any wharfage, dockage, quay dues or similar charges at all loading and discharging ports' and, hence, leaves no doubt whatsoever that dockage charges must be absorbed by charterers. For your information, dockage in Los Angeles is a charge for the use of a berth. Dockage is calculated on vessel's LOA and for vessels between 165 and 180 metres the charge is USD 1,158.00 per 24 hours. We fully agree with you that charges incidental to vessel entering the loading/discharging place would be for owners' account. This follows from the second sentence of Clause 12 reading:

'Entrance and clearance fees whether measured by the dues, and other usual port charges on the Vessel shall be paid by the Owner.' "

Arbitration Award: On 8 July, the Secretariat received a transcript of American Arbitration Award No. 2085 dealing with several disputes under the "Vegoilvoy" Charter - among others, liability for berth hire USD 5,353.00 at Bombay and dockage expenses at Houston amounting to USD 1,473.62 with interests. The relevant clause of this charterparty reads:

"Part II 12. Dues, Wharfage, Taxes. The vessel shall be free of any wharfage, dockage, quay dues or similar charges at all loading and discharging ports. Entrance and clearance fees whether measured by the volume of cargo or not, towing and tug charges, pilotage, dues, and any other usual port charges on the vessel shall be paid by Owner. All other dues, taxes, assessments, and charges on the cargo shall be paid by the Charterer including but without limitation any habilitation tax, Customs overtime, taxes on freight at loading or discharging ports as well as any unusual taxes, assessments or governmental charges whether in effect at present or whether imposed on the Vessel or freight in the future and whether or not measured by the volume of the cargo, shall be paid by the Charterer."

The Arbitrators decided:

"Berth Hire: The arbitrators find that Owner is entitled to reimbursement of Berth Hire paid at Bombay in the amount of USD 5,448.34 with interest at 12 per cent. per annum from September 1, 1983, until the date of this award. Prior to commencement of this proceeding, Charterer resisted payment of the berth hire charges with the argument that these charges were distinguishable from wharfage on the cargo payable by receiver and constitutes 'usual port charges on the vessel'. Charterer further maintained that it was a custom of the trade that berth hire charges were paid by Owner. At the time, Owner pointed out that berth hire is not a usual port charge but rather is a fee for the use of the berth and that in accordance with clause 12 of the Charter Party, the vessel was to be free of any wharfage, dockage or similar charge. In its submission to the arbitrators, Charterer does not mention its earlier arguments, but merely states that it is dissatisfied with Owner's invoice as the latter was unsubstantiated. The arbitrators have received copies of the underlying Bombay Port Trust Invoice and finds the **revised amount** of USD 5,448.34 duly substantiated. The arbitrators further hold that these charges are for Charterer's account. Clause 12 is quite explicit where it says 'The vessel shall be free of any wharfage, dockage, quay dues or similar charges'. In effect, the clause requires that Charterer make arrangements with the proprietor of any wharf used for loading or discharging that no charge will be levied on the vessel for lying alongside. In the instant case this means that Charterer should have advanced funds to cover the berth hire or arranged for receivers of the cargo to do so. Failure to do so is a breach of the Charter Party and Charterer must reimburse Owner for the costs flowing from this breach.

Dockage at Houston: The arbitrators find that dockage charges at Houston in the amount of USD 1,473.62 have been duly substantiated and Owner is entitled to reimbursement in this amount with interest at 12 per cent. per annum from 25 November, 1983, to the date of this award."

■ Recommencement of laytime at second and subsequent discharging ports - whether notice of readiness is required at each port

Enquiry: " ....laytime is to count from 1400 hrs if n.o.r. for discharging is given before noon (noon included) and from 0800 hrs on the next day if the n.o.r. is given after noon. In the C/P nothing additional is said r.e. second discharge port.

There were no problems re. n.o.r. and commencement of laytime in the first discharging port. Charterers ordered the vessel to proceed to the second discharge port for final discharge. Vessel arrived there Monday 09.07.84 at 1200 hrs and Discharge commenced Monday 09.07.84

at 1400 hrs. Please clarify when the laytime starts to count (bearing in mind two discharge ports)."

Reply: "BIMCO is invariably of the opinion that it would require an express provision in the C/P if notice required at each port. In the absence of such express provision or other provision specifically regulating the question of recommencement of laytime at second port, it would restart on vessel's arrival off the port (in case of congestion), or at the berth if same is free on vessel's arrival."

This is supported by the following comments in the handbook entitled Laytime by Michael Summerskill:

"**Notice only at first loading port**
Although notice of readiness is needed at a sole loading port, even in the absence of an express stipulation to that effect, notice is not needed at later loading ports, unless the charterparty requires it. The reason for this rule is that where there has been a call at the first loading port, the charterers are aware that the ship has begun to fulfil her obligations. They must be presumed to be following her course and making loading preparations accordingly."

"**Notice at later loading ports**
It does not follow from the decision in the *Burnett SS. Co. Ltd.* case that notice of readiness will never be necessary at ports other than the first loading port. It is always open to the parties, by apt words such as 'lay days *at each loading port* to commence on the day following notice of readiness to load' to agree that there shall be notice at each loading port. In the absence of such words the courts will apparently take the view that business efficiency requires notice only at the first port."

The above is equally valid in respect of discharging if the charterparty provides for a notice of readiness to be given at discharging port.

■ Whether time counts when vessel is forced to leave berth due to weather conditions - GENCON C/P

Enquiry: Vessel is fixed from Vivero and the vessel is presently off the loading port. After having commenced loading she had to leave the port due to storm causing dangerous swell and she is presently at roads waiting for the weather to improve so that loading can continue. The C/P stipulates "Vivero" and nothing is said about good/safe.

The member's question was whether time whilst waiting should count and also if charterers were responsible for the costs.

Reply: From pages 82-83 of the BIMCO Annual Report 1982-l983, it should be noted that, in principle, counting of laytime would not be interrupted during the period in which vessel had to leave the berth save for exceptions which in any case would apply, even if vessel remained at the berth, e.g. Sundays, Holidays, etc.

As to the cost of leaving/returning to berth, all depends on whether owners can demonstrate that charterers breached their implied duty to designate a safe/suitable berth for the particular vessel.

In this respect, BIMCO quoted the following excerpts from a handbook on maritime law entitled *Scrutton on Charterparties*, which (although referring to "port") in BIMCO's view applied equally to "berth":

"Whether a port is a 'safe port' is in each case a question of fact and degree and must be determined with reference to the particular ship concerned, assuming that she is properly manned and equipped and navigated and handled without negligence and in accordance with good seamanship. As a broad statement of the law a port will not be safe unless in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.

A port which would otherwise be unsafe may become a safe port if the charterer gives the owner sufficient warning of the dangers of the port to enable the vessel to avoid them."

and

"A port will not necessarily be unsafe if a ship has to leave it in certain states of the weather..."

In many arbitration awards concerning safety of berth, arbitrators apply the test of whether vessel can leave the berth safely if conditions demand leaving the berth. If the answer is "yes" then the "safe berth", "safely", etc., warranty is not breached, bearing in mind that there are hardly any berths at which a vessel could remain safely irrespective of weather conditions.

On pages 82-83 of the above-mentioned Annual Report the following passage can be found:

"From time to time enquiries are made with the BIMCO Office as to laytime counting when a vessel is ordered out of berth by the port authorities, for instance, for reasons of safety."

In the Case *Compania Crystal de Vapores of Panama v. Herman & Mohatta (India) Ltd.,* Queen's Bench Division, London, reported in Lloyd's List Law Reports 1958, Vol. 1., the issue was whether laytime counted when the Harbour Master ordered the vessel to vacate her berth because of approaching bore tides. Laytime was based on "weather working days".

The Court held that laytime continued to run during the six days of interruption, save only during those periods expressly excepted, e.g., Sundays, Holidays and periods of unsuitable weather. In the *Gebr. Broere B.V. v. Saras Chimica*, Queen's Bench Division, London, judgement rendered on July 22nd, 1982, concerning the application of "weather permitting" exception, it was held by the Court:

"Laytime would also be interrupted if, after a further period the weather worsened and the vessel had, for her own safety, to leave her berth for a period. However, it would not be interrupted, albeit the vessel could not for safety reasons reach her berth, if loading would not have been interrupted by weather had she been in berth."

Whenever disputes of this nature should arise, members should be guided by the principles referred to in this article."

Deadfreight and laytime calculation

Enquiry: Members requested the BIMCO Secretariat to advise on the position in Britain as well as in U.S.A. with regard to laytime calculations in cases of deadfreight, i.e. if "time allowed" should be calculated on the basis of quantity of cargo on which freight is paid or on the basis of quantity of cargo actually loaded/discharged.

Reply: The position in U.S.A. is rather simple as can be seen from pages 8197-8198 of BIMCO Bulletin 5/85 where the discussion and decision of the arbitrators in American Arbitration Award No. 2107 is quoted and from which it follows, *inter alia*, that:

"With respect to the calculation of laytime, the panel finds that the calculation must be based upon the quantity of cargo for which freight has been paid. In so finding, we follow the same reasoning laid down in Buenamar, supra, which holds that the theory of deadfreight is to return Owner to the same position it would have been in had the full cargo been loaded, and to calculate laytime on a lesser quantity would be to unjustly enrich Owner."

The position in Britain is more complicated. The initial rule is simple: laytime must be calculated on the quantity actually loaded irrespective of quantity on which freight and deadfreight may be paid. Owners, however, should not be better off than they would have been had the breach (non-delivery for shipment of the contracted minimum quantity) not occurred which may involve some crediting in respect of demurrage/despatch, etc.

The leading judgement is the *Ionian Skipper*, Queen's Bench Division (C.T.) March 21 and 22, 1977, and this decision may be rooted in the following approach which can be found in a handbook on maritime law entitled A Handy Book for Shipowners and Masters by H. Holman:

"The amount due to the shipowner for deadfreight is calculated by ascertaining the amount which might properly have been carried over and above the amount shipped, estimating the freight on the difference, and deducting the additional expense (if any) which the shipowner would have incurred if the difference had been shipped, carried and discharged."

Timber trade - packaged goods

Enquiry: When loading timber in small ports like....., it is impossible to employ tallymen from shore. Hence, tallying is performed solely by vessel's crew and remarks concerning number of packages and slack packages are noted accordingly in Mate's receipts. However, shippers, by referring to Letter of Credit refuse to accept corresponding remarks in the B/L and refuse to settle claims when the results of tally by the crew is fully confirmed at the port of discharge. Shippers also refuse to include in the B/L the wording "'X' packages said to be 'Y' pieces". BIMCO's comments were requested by our member.

Reply: The situation is, basically, not different than when, as it often happens, shippers insist on a "clean" B/L although the condition of cargo, packing, dictates otherwise. If owners/Master succumb to the pressure they make themselves open to cargo claims for damage, shortage which occurred before shipment.

The BIMCO Secretariat has, obviously, no patented solution on how to eliminate such clashes of interest. We think, however, that awareness of the following points may be of assistance:

a) the terms a Letter of Credit are not in the shipowners' sphere of risks/liabilities. It cannot be owners' problem that the L/C prohibits B/L clauses' "said to be".

b) there is no reason whatsoever why the impossibility of engaging an independent shore tally (be it by the Master or by shippers) should work to shipowners' disadvantage. Nothing can prevent the shippers from assigning a man employed by them to co-tally with the crew.

c) we believe that a firm and resolute stand taken by owners always pays off. If charterers/shippers wish a "clean" B/L, then it would be only fair and equitable if the charter party allowed the Masters to reject "slack" packages. In any event, the Master may advise shippers on commencement of loading that "slack" packages will be rejected.

Obviously, you cannot force shippers to appoint someone to tally (which otherwise would be the best way of avoiding problems which are encountered at the moment of signing B/L) but equally the shippers cannot force the Master to sign a clean B/L when facts command otherwise. Such confrontations have existed since the invention of a B/L and only the more resolute/persistent party wins. Unfortunately, it is often the Master who bows to pressure exerted by shippers. It is so because the Master faces the dilemma of attempting to avoid delays in sailing away or facing cargo claims, and support or instructions from owners are ambivalent or non-existent.

What is often forgotten is that shippers face a dilemma too. Without a "clean" B/L they cannot cash under the L/C. All of this brings us back to the following essential:

The problem shall not be deferred to the moment of signing B/L.

In our view, the Master, knowing what to expect in this port and trade, should kindly but firmly tell shippers that it is their choice: either they deliver the goods in good condition or face the prospect of a dirty B/L. Anyhow, such matters are not resolved by niceties. The one with the stronger nerves gets what he wants.

As to principles (we quote from a handbook on maritime law):

"Likewise, if the mate's receipts show that the goods were delivered to the ship in a damaged or imperfect condition the Bill of Lading must record that fact. For by signing a clean Bill of Lading a Master renders himself and his owners liable to any bona fide holder of the Bill of Lading (other than the shipper) for damage done to the goods prior to shipment."

and

"If a Master should sign and issue a clean Bill of Lading in respect of goods which were externally damaged on shipment, he can only protect his own and his owners' interests by:

a) signing protests at once which clearly disclose that the statement in the Bill of Lading as to the good order and condition of the goods on shipment was inaccurate, and

b) ensuring that the contents of the protests are brought to the notice of an indorsee of the Bill of Lading before he takes it up."

Voyage chartering - vessel's readiness

Enquiry: The C/P provided for laytime to commence 08.00 next working day after ship is reported Monday through Friday 08.30-16.00, being ready in every respect. Vessel arrived discharging port and berthed 7 February at 16.00 hours. Notice of readiness was tendered upon berthing. Hatches were opened by crew from 16.00 to 17.15 hours and discharge commenced 17.30 hours on the same day.

Charterers claim that vessel was only in every respect ready after all hatches had been opened and thus they consider the notice of readiness accepted 8 February 08.00 hours with laytime commencement 9 February 08.00 hours. In our opinion a vessel need not necessarily be in all respects physically and legally ready to be able to give valid notice of readiness and hence, the notice given 7 February 16.00 hours should be valid and laytime therefore commenced to count 8 February at 08.00 hours. BIMCO's comments were requested by the member.

Reply: "We acknowledge receipt of your letter....from which it follows that there is a misunderstanding as to the concept of readiness.

In the nature of things, a different state of readiness is required when vessel has to wait for commencement of cargo operations (it would be nonsensical to open hatches immediately on arrival at, e.g. waiting place and get the holds soaked with rain when, e.g. loading of sugar will commence only after several days of waiting), than when vessel goes straight to loading/discharging berth and cargo operations are to commence immediately.

In this context we would quote the following excerpt from page 97 of *Laytime* by Michael Summerskill:

"A ship is ready to load, in the sense that shipowners can give a proper notice of readiness for the purpose of the laytime clause, when she is available to the charterers, so far as they can use her at that time. She must be available in the legal sense, in that no laws or regulations stand in the way of access by the charterers, and in the physical sense, in that access to the ship and her holds is possible. As Lopes J. said in *Groves, Maclean & Co. v. Volkart Brothers*...."

and from *The Law of Demurrage* by Hugo Tiberg:

"The physical readiness that can be required before the ship is in berth must depend largely on the circumstances, but it would seem that it should at least not fall short of that needed before the cancelling date which may be mentioned in the charterparty, so far as that relates to loading and discharge. Thus at the port of loading the ship must be empty with clean holds and no more ballast than is required for stiffening.

Those preparations which fall to the shipowner's lot and are normally performed by the crew should also be completed if this can conveniently be done at this stage, but special dunnage or mats etc. that may be needed to protect the cargo cannot be required, at least where they must be produced from ashore and installed by shore workmen, unless this is set out in the contract or can be implied in the shipowners' obligation.

It has been said that hatches need not be uncovered nor hatchbeams removed, and the ship must remain seaworthy for the place where she is laying and for her shifting to her proper berth."

and

"The ship must have loading gear fit for normal loading, though it need not be completely rigged while she is waiting for berth."

and

"Where the ship must be berthed the general requirements for readiness are somewhat stricter. The hatches must be uncovered so that they can be opened at the time when loading or discharge is due to begin. Installation of dunnage or other preparation of the hold can usually be required. If reception is taken or delivery given alongside, the ship's loading gear will have to be rigged, while a different rule appears to prevail where the charterer is to perform the entire operation."

In short, the vessel is not ready when the situation is that she goes straight to berth, when everything on shore is prepared to commence cargo operations immediately but closed hatches hinder shippers'/receivers' access to the holds.

It is a different situation if laytime commences to run at the waiting place and there is some delay in commencing cargo operations because, out of necessity, the crew opens the hatches only upon reaching the loading/discharging berth. In this situation there is no suspension of counting of laytime during the delay (unless the charterparty provides otherwise) because reasons of safety and fitness of holds to receive cargo (protection against rain) may speak against opening of hatches before the vessel comes to rest at loading/discharging berth.

■ Voyage C/P- discharging port rotation

Enquiry: Vessel is fixed to discharge "One or two safe port(s) European Mediterranean not East of but including Greece and Turkey...". There is no special stipulation in the C/P in respect of rotation.

After partial discharge at first port (Cagliari), vessel was ordered to proceed to Spanish Mediterranean (intention Malaga) for completion of discharge thus to perform reverse rotation which means deviation of 4-5 days. Owners agree to proceed to second discharging port in non-geographical rotation but require charterers to pay extra freight covering cost of time at demurrage rate and bunkers consumed. BIMCO's comments were requested as to whether the member was entitled to compensation.

Reply: "We are of the decided opinion that owners have every reason to insist on compensation for extra steaming. It would be, in our view, an untenable state of affairs if charterers could order the vessel back and forth so that she had to cover part of the voyage twice. The owners may, in our opinion, find support for their demand in the *Hadjitsakos* judgement to which we refer on page 89 of BIMCO Annual Report l976-l977. For future reference, please see our recommendations on page 10 of this book.

Outcome: The Secretariat was subsequently pleased to receive the following from the member: "We would like to inform you that the case was finally settled in the spirit of your comments".

Nomination of discharging port

Enquiry: Vessel was fixed for discharging in Japan. Charterers were to nominate discharging port(s) latest 96 hours off south Japan. Charterers nominated Sakai as sole discharging port, naming port agents and asking owners to advise ETA. However, the following day charterers changed their nomination to Muroran.

BIMCO's member enquired whether charterers were entitled to change discharging port nomination and whether owners could refuse the second nomination.

Reply: Once charterers have nominated the discharging port they cannot change this nomination without owners' consent. This is explained as follows in a handbook on maritime law:

"Once the charterer has exercised his right of selection the position is the same as if the port chosen had been named in the charter party; so having made the nomination he has no right to change it."

Nothing could, however prevent parties from reaching an agreement outside the terms of the charter party in which case owners may propose the conditions on which they would be agreeable to such change of nomination and it would then be for the charterers to decide whether they wish to accept owners' proposal.

SYNACOMEX C/P - whether charterers are entitled to load wheat when vessel is fixed for a cargo of "H.S.S.".

Enquiry: Vessel was fixed to load a cargo of "h.s.s.". Eventually only wheat was loaded and upon owners' enquiry, charterers explained that "h.s.s." comprised any grain cargo which could be wheat, maize, barley or similar as bulk grain.

BIMCO's member enquired whether charterers were contractually allowed to load only wheat under the cargo description "h.s.s.".

Reply: According to material available in this office "h.s.s." is an abbreviation for "heavy grain, soyas, sorghum".

In the handbook titled Chartering and Shipping Terms by J. Bes "heavy" grain and "light" grain is defined as follows:

"According to the 'Merchant Shipping Act' of 1894 the term 'grain' covers all kinds of grain (wheat, maize, rye, barley, oats), rice, paddy, pulse, seeds, nuts or nut kernels. Wheat, rye and maize are considered as 'heavy' grain, whilst barley and oats are classified as 'light' grain.

In some trades it is customary to freight heavy grain on the basis of quarters of 480 lbs., compared with quarters of 400 and 320 lbs. for barley and oats respectively. This method of freighting results in approximately equal rates per long ton on the basis of space actually occupied per long ton.

If the rate is assessed at so much per 100 lbs., a surcharge is fixed for light grain as a compensation for the higher stowage factor."

From the above you will note that wheat would come under "heavy grain" and whilst "h.s.s." according to the above does not lend itself to such liberal interpretation as applied by charterers, still, they may have a point in maintaining that they were within their contractual rights to load a cargo of wheat.

"Reversible" laytime

Enquiry: Vessel was fixed with "reversible" laytime. Based on the B/L weight laytime allowed was 4 days 40 minutes for loading and 2 days 21 hours 3 minutes for discharging, or total 6 days 21 hours 43 minutes.

Vessel used 6 days 6 hours 25 minutes at loading and, hence, based on one "total" calculation there would be 15 hours 18 minutes left for discharging.

Owners' viewpoint was that vessel came on demurrage at loading port since laytime allowed for loading was exceeded, not taking into account the implication of "reversible" laytime. BIMCO's comments were requested as to the implication of "reversible" laytime.

Reply: "Reversible" laytime implies that charterers have the option to make either one "total" laytime computation or two separate calculations, one for loading port and one for discharging port (see page 14 of this book).

This was confirmed in the *Atlantic Sun*, Queen's Bench Division (CT) judgement (L.L.R. 1972, Vol. 1) in which it was held, *inter alia*, "that, on their true construction, the words "to be reversible" conferred an option on the charterers". Hence, charterers may opt for one "total" computation, but once they have advised which method of calculation they opt for their decision cannot be revoked.

C(Ore)7 C/P - heavy delay in loading due to shortage of cargo

Enquiry: The vessel arrived at loading port 26 August and was still idle due to shortage of cargo. Charterers have advised that loading prospects are 10 October. According to owners' calculation laytime expired 10 September.

Having the above in mind, owners would like to send the vessel elsewhere for other employment and claim compensation from present charterers in terms of deadfreight and demurrage from expiry of laytime until vessel sails away.

The member requested BIMCO's advice whether owners were entitled to let the vessel sail and claim compensation.

Reply: The most important thing in a situation like the present one is to be careful not to take a wrong step which would all of a sudden put the charterers in a position in which they could claim that it is the owners who breached the contract.

First of all, it must be kept in mind that owners can order the vessel to sail away and claim compensation etc. only if the charterers' conduct amounts to breach of contract in the sense that it is apparent that they are not going to supply the cargo. In the handbook on maritime law

entitled A Handy Book for Shipowners and Masters (Sixteenth Edition) by H. Holman the position is explained as follows:

"The consequences of a charterer failing to provide any, or sufficient cargo, are as follows:

1) If the charterer repudiates the charterparty by failing to provide any cargo, the shipowner may treat the contract as at an end and recover damages for its non-performance. This failure will only amount to repudiation if either (a) the charterer gives the shipowner notice that he cannot or will not provide a cargo, or (b) it is apparent, without such notice being given, that no cargo will be made available for shipment before the charterparty is frustrated. In the latter case the shipowner does not have to wait until the laytime has expired before treating the charterparty as ended. He may take this step as soon as it is apparent that a cargo will not be provided in time. But the longer he postpones his decision the more certain he will be of establishing, if necessary, that the charterer's conduct amounted to repudiation. A shipowner would be ill-advised to treat the charterparty as over without first consulting his Club."

From your telex it follows, however, that charterers advise that loading prospects are 10 October. This does not indicate that they are unable to supply the cargo at all and in such case the following excerpt from the above handbook may be relevant:

"**2)** If the charterer's conduct does not amount to repudiation of the charterparty, the ship must wait until the cargo is made available for shipment. If the laytime is exceeded by the charterer failing to have the cargo ready in time, the shipowner is entitled to demurrage; not to damages at large for the detention (*Inverkip v. Bunge*, 1917)."

In this context it should be kept in mind that once the cargo is on board the vessel, owners may later exercise lien on the cargo as security for payment of demurrage due.

Suitability for grab discharge - "Africanphos 1950" C/P

Enquiry: Vessel was fixed to load a cargo of phosphate. She was described as "Freedom type flush tween" and last sentence of clause 20 was amended to read:

"Vessel to be suitable for grab discharge as far as a Freedom type tween can be suitable for grab discharge."

At discharging port charterers claimed that extra expenses due to inaccessibility of cargo to grabs should be absorbed by the owners who rejected this contention with reference to clause 20. BIMCO's opinion as to the merits of charterers' claim was requested.

Reply: In the nature of things a tweendecker may be less suitable for grab discharge than e.g. a bulkcarrier but from the outset charterers knew that they chartered a tweendecker and, moreover, the grab suitability provision in clause 20 was qualified as outlined in your telex. Consequently we fail to see that there would be any contractual basis on which charterers could saddle owners with a portion of the discharging costs. Please be referred to page 8861 of BIMCO Bulletin 4/87 where you can find a summary of a pertinent arbitration award.

In this context, we would mention that articles on grab discharge have appeared in various

BIMCO publications, *inter alia* in BIMCO Annual Report 1982-1983 where the following general comments appeared:

"It may be useful to repeat that the view expressed by BIMCO in these matters invariably is that it may reasonably be held that the implications of a 'Grab Discharge' Clause are to the effect that if the grabs could be hoisted down into the holds of the vessel, then the holds are suitable for grab discharge. Even if a smaller proportion of the cargo was left in the fore and aft parts of the holds or in the wings, as a result of which some trimming and sweeping was involved, this still does not make the holds unsuitable for grab discharge. It would seem that such argumentation would really be beside the point.

Discharging by grabs does not mean 'vacuum-cleaning' the holds. The smaller proportion of the cargo which may be left in the corners and in the wings of the holds and which cannot be reached by the grabs, must necessarily be brought forward by trimming and sweeping. This is the normal procedure in connection with the discharging of bulk cargoes and in this connection it may be of some importance to the owners if it could be proved that on previous or later voyages the vessel had discharged other bulk cargoes without being charged for extra costs.

It is borne out by the many disputes which have been dealt with in the past that particularly the wording - or perhaps rather the improper or unclear wording - of the 'Grab Discharge' Clause agreed in the charter in some cases is the root of the problem. In this context it also has to be said that cases have been reported which show that charterers or stevedoring companies have tried to obtain unwarranted benefits under the provisions of such a 'Grab Discharge' Clause.

The general recommendation is that owners should resist any attempts by charterers to introduce onerous 'Grab Discharge' clauses in charterparties.

It may, of course, be difficult to recommend a 'watertight' clause which would exclude all possibility of disputes. However, in the opinion of BIMCO, the most important thing is that the parties should always try to define as clearly as possible in the contract the place or places 'inaccessible' to grabs in each individual case.

As an example of a 'Grab Discharge' Clause which aims at covering such a contingency, reference is made to the MURMAPATIT Apatite Charter Party which contains a special clause dealing with this matter *viz*., Clause 23 reading as follows.

> 'No cargo to be loaded into places inaccessible to grabs, namely into deeptanks, bunker spaces, wings and ends of 'tween-deck. However, the Master to have liberty of loading in these places for purpose of stability of the Vessel, and any extra expenses over and above the costs of normal grab discharge incurred for the cargo not accessible to grab to be for Owners' account. Extra time used for discharging from such places not to count.'

A similar 'Grab Discharge' Clause is found in the SOVORECON Charter Party (Clause 24)."

In the Clause section of Forms of Approved Documents the wording of another "Grab" clause can also be found.

Excess cargo loaded - freight basis quantity carried

Enquiry: Vessel was fixed to load 1,100 tons 5 per cent. more or less in owners' option. Owners nominated a vessel capable of loading 1,400 tons. Charterers were asked whether cargo quantity could be increased, but their reply was negative. Upon vessel's arrival notice of readiness was given and agents were informed that vessel was to load 1,100 tons 5 per cent. more or less in owners' option.

Upon completion of loading, it was found that the shippers had actually supplied 1,397 tons to the vessel. Charterers refused to pay freight basis actually loaded quantity claiming that owners were only entitled to freight for the maximum contracted cargo. Owners demand freight for quantity of cargo actually carried. The member requested BIMCO's advice whether owners were entitled to claim freight for the quantity of cargo actually carried.

Reply: BIMCO is of the decided opinion that, generally speaking, freight must be paid on the quantity of cargo carried. It is always open to the charterers to give shippers strict instructions that maximum quantity should not be exceeded and, hence, when loading must be stopped.

The Master obviously has neither the authority to decide that the contracted quantity should be exceeded nor has he a duty to be the guardian of charterers' interests in this respect. After all, no-one can, in our opinion, expect that owners carry part of the cargo "gratis". Hence, BIMCO invariably holds the view that it must be a matter between charterers and shippers to clarify why shippers delivered excess cargo.

Contractual cargo quantity exceeded - whether owners entitled to freight for quantity carried

Enquiry: Vessel was fixed to load 15,000 tons 10 per cent. more or less in owners' option. The estimated stowage factor of the cargo was 45 cubic feet per ton. Vessel was expected to be able to load 26,300 tons. After completion of loading it was established that vessel had loaded 27,600 tons and hence, apparently the stowage factor appeared to be less than 45 cubic feet per ton.

Charterers claim that as the fixture was basis 25,000 tons 10 per cent. more or less in owners' option, they need not pay freight for quantity loaded in excess of 27,500 tons, whereas owners of course claim to be entitled to freight for cargo actually carried. BIMCO's advice was sought by our member as to whether owners' or charterers' approach was correct.

Reply: Freight should be paid on the quantity of cargo carried. It is always open to the charterers to give shippers strict instructions that maximum quantity of cargo should not be exceeded and, hence, when loading must be stopped. The Master obviously has neither the authority to decide that the contracted quantity should be exceeded, nor has he a duty to be the guardian of charterers' interests in this respect. The actual reason why shippers have delivered excess cargo to the vessel must be a matter which charterers must clarify with shippers.

No-one can, in BIMCO's opinion, expect that owners carry part of the cargo "gratis". An interesting question (though not at issue) is whether charterers would deliver the excess cargo to receivers free of charge.

Signing B/Ls when intaken quantity disputed

Enquiry: Vessel completed loading and according to vessel's figures the quantity loaded was 15,897 metric tons, whereas the Bill of Lading figure was 16,919 metric tons. Please advise best course of action open to Master to protect owners' interests:

1) to sign Bills of Lading and issue a letter of protest
2) not to sign such Bill of Lading
3) to sign the Bills of Lading issuing a letter of protest and make a reservation in the Bill of Lading.

BIMCO's advice was sought by our member as to which of the above alternatives should be applied by owners.

Reply: Alternative 3) outlined in your enquiry is the proper approach to cases where the quantity at loading port is in dispute. This is explained as follows in the handbook entitled *Handy Book for Shipowners & Masters* by H. Holman:

"When the bills are presented to him for signature the Master should check the statements therein against the tallies and the mate's receipt. If the quantity of goods stated in the bill of lading to have been shipped differs from the quantity recorded in the tallies and receipts the Master must qualify the bill of lading statement accordingly, in order to protect his own interests. For if he is sued by the consignee or indorsee of the bill he may rarely dispute the accuracy of the bill of lading statement as to quantity.... A shipowner is not, however, bound by an inaccurate statement as to the quantity of goods shipped in a bill of lading signed by the Master, but in an action for short delivery the burden is on him to prove that the quantity shipped was less than that represented in the bill of lading."

As will be seen from the above, it is, therefore, of the utmost importance that the Master if he has good reason to doubt the quantity of cargo stated in the Bill of Lading, makes an appropriate remark in the bill of lading.

"Asbatankvoy" pumping warranty

Enquiry: Vessel was to discharge in accordance with the following "Asbatankvoy" C/P provision:

"Owners warrant that vessel can discharge the entire cargo within 24 hours or maintain a pressure at ship's rail of 100 psi provided shore facilities permit."

Due to problems with shore back-pressure discharging of the cargo was delayed. Master issued a letter of protest in due course. Charterers, however, categorically refused to accept responsibility for the excess time used in discharging. Our member requested BIMCO's advice as to whether charterers were entitled to saddle owners with the excess time used in discharging.

Reply: We will send you a reference to an English arbitration award which dealt with a clause similar to the one quoted by you and in which it was decided that "the owners' obligation was conditional upon the shore facilities permitting them to comply with it".

From this it follows that if owners were prevented from fulfilling their part by the charterers' failure to provide adequate facilities, then obviously the charterers would have to pay demurrage for the time used in excess of the laytime allowed. For members' convenience we reprint below the English arbitration award referred to, which appeared in *Lloyd's Maritime Law Newsletter No. 121* of 21 June, 1984, and is reproduced by kind permission of the publishers, Lloyd's of London Press Limited.

"**Crude oil voyage charter - Whether owners in breach of pumping warranty**
The vessel was chartered on the 'Asbatankvoy' form. By the time she arrived at the discharge port she was already on demurrage. A dispute arose as to the amount of demurrage payable at the discharge port. Discharging commenced at 21.00 on 27 July and continued until 10.35 on 30 July. Owners claimed demurrage for this period. Charterers alleged that owners were in breach of the pumping warranty of the charterparty and therefore were entitled to damages which would cancel out the relevant demurrage claim.

Typed clause M4 in the charter provided:

> 'Owners warrant vessel is capable of discharging her entire cargo within 24 hours or maintaining 100 psi at ship's rail provided shore facilities permit.'

Held, that the obligations under clause M4 were alternative. Either the ship had to discharge the entire cargo within 24 hours or she had to maintain a back pressure of 100 psi at the ship's rail. In either event, the owners' obligation was conditional upon Shore facilities permitting them to comply with it. The owners had failed to discharge within the 24 hours but they had claimed that they did maintain back pressure of 100 psi at the ship's manifold (equivalent to the rail). The charterers accepted that the ship's maximum discharging pressure was equivalent to 100 psi. Furthermore, the evidence had shown that there was no breach of the warranty in respect of the ship's capability as to back pressure, and that back pressure had been maintained.

The real problem was that the ship had only been provided with one shore line into which to discharge her cargo. Responsibility of shore lines fell upon the charterers under Part II clause 11 of the charter. If additional lines, or a line of a sufficient diameter had been provided by the charterers, the ship could have discharged much more quickly, and undoubtedly within 24 hours.

The owners had satisfied one of the alternative warranties in clause M4 and were prevented from fulfilling the other by the charterers' failure to provide adequate facilities. The charterers had failed to show any breach, and were therefore not entitled to any adjustment to the demurrage calculation in that respect."

■ Suitability for grab discharge

Enquiry: The vessel was fixed to discharge coal at Antwerp. She was described, *inter alia*, as singledecker/bulkcarrier, gearless, 7 holds/hatches. The C/P contained a "grab discharge clause" the pertinent part of which read: "The vessel to be suitable for grab discharge and no cargo to be loaded into spaces inaccessible to grabs, namely, deeptanks, bunker spaces, wings and ends of tweendecks..."

Charterers claim that hold no. 1 was highly inaccessible for grab discharge (open brackets all along), necessitating extra labourers and slowing down discharge operations considerably. Charterers' claim for vessel's unsuitability for grab discharge was essentially based on a "grab discharge clause" contained in the stevedoring contract between charterers and the stevedore company. The summary of S.M.A. Award No. 2444 which appeared on page 9247 of BIMCO Bulletin 4/88 has been noted, but the present contract was not governed by U.S. law. BIMCO's advice was sought by our member as to whether the charterers' claim was valid.

Reply: It would appear that at the root of the problem, in fact, lies the difference of suitability for grab discharge according to the terms of the stevedoring contract and clause 19 of the C/P as quoted. Of course the two contracts must be viewed independently. Charterers cannot saddle owners with the effects which may be incurred under a contract to which owners are not a party. Hence, charterers must foot the bill from their contractual partner, i.e. the stevedore company, and whether or not charterers may subsequently claim reimbursement from owners depends on the terms of the C/P.

In BIMCO Annual Report 1982-1983 pages 72-73* the subject of suitability for grab discharge is commented on and, although it is difficult to devise a clause which would once and for all put an end to all problems arising in this context, it should be kept in mind that discharging by grabs does not mean "vacuum-cleaning" the holds. Moreover according to clause 19 the parties have contractually agreed that "spaces inaccessible to grabs" are "deeptanks, bunker spaces, wings and ends of tweendecks". If the case is that no cargo has been loaded in these spaces then vessel has not loaded cargo in "inaccessible spaces" and, hence, there is no contractual basis for an attempt to saddle owners with possible extra expenses incidental to trimming/sweeping which may be incurred under a different contract to which owners are not a party.

** The article referred to above reads as follows:*

"Grab Discharge" Clause - Suitability for Grab Discharge

In the BIMCO Annual Report 1978-1979 pages 68-70, reference was made to an arbitration award rendered in London in 1977 in owners' favour. In the award, arbitrators fully reconfirmed the position in respect of suitability for grab discharge as hitherto acknowledged and directed the charterers to refund to the owners an amount of about USD 15,000 which they had wrongfully withheld from the freight for alleged extra discharging expenses.

In another arbitration award rendered in 1980, the larger part of the charterers' claim for non-suitability for grab discharge was dismissed on the grounds that since the full particulars of the vessel, number of decks and holds and size of hatches, were expressly included in the charterparty, the charterers had full knowledge of the vessel which they had chartered. (Details of the Award were reported in Lloyd's Maritime Law Newsletter No. 14, 1980).

As, nevertheless, disputes of this nature continue to be reported by members, it may be useful to repeat that the view expressed by BIMCO in these matters invariably is that it may reasonably be held that the implications of a 'Grab Discharge' Clause are to the effect that if the grabs could be hoisted down into the holds of the vessel, then the holds are suitable for grab discharge. Even if a smaller proportion of the cargo was left in the fore and aft parts of the

holds or in the wings, as a result of which some trimming and sweeping was involved, this still does not make the holds unsuitable for grab discharge. It would seem that such argumentation would really be beside the point.

GENCON C/P - "WIBON" vessel unable to enter berth because of fog

The *Kyzikos* was fixed on GENCON C/P which contained, *inter alia*, the following provisions:

"1-2 safe always afloat, always accessible berths each port.
...Cargoes to be...discharged free of risk and expense for owners.
Time to commence at 2 pm if notice of readiness...is given before Noon and at 8 am next working day if notice is given during office hours after Noon...
Time to count...Wipon/Wibon/Wifpon/Wccon..."

When vessel arrived at discharge port, she was unable to proceed to the free berth as the pilot station was closed due to fog. Notice of readiness was given when vessel came to rest at the waiting place. Owners claimed that notice triggered off commencement of running of laytime on expiry of the agreed notice time and hence, that vessel in the event came on demurrage for 14 days 9 hours 16 minutes. Charterers denied liability. The dispute was subsequently submitted to arbitration. The arbitrator decided that the reference to "WIBON" turned the charter into a "port" charter and that owners' claim succeeded in full.

The charterers appealed to the High Court. Owners were given leave to contend that the appeal should be upheld on the alternative ground that charterers had not provided an "always accessible" berth.

In Queen's Bench, Webster, J. held, *inter alia*, that "even if the 'WIBON' provision had the effect of converting a berth charter into a port charter, the vessel was not an arrived ship at the port because she was not at that time at the immediate and effective disposition of the charterers..... The arbitrator's award must be set aside unless the owners could successfully rely on the words 'always accessible berth(s) each port'.

The owners could not establish that the charterers were in breach of their absolute obligation to nominate a berth which was always accessible ..."

The owners appealed to Court of Appeal. Court of Appeal allowed the appeal deciding, *inter alia*, that "The provision 'whether in berth or not' enabled a valid notice of readiness to be given once the vessel had arrived in the port even though the reason why she was prevented from proceeding further was not unavailability of a berth but bad weather.

The effect of the 'whether in berth or not' clause was to turn a berth charter into a port charter so that time started to run when the vessel was waiting; she was in a fit state to proceed to her berth and discharge; thus the owners were entitled to give notice of readiness provided that she was at the immediate and effective disposition of the charterer." Thus in essence restoring the arbitrator's decision.

The charterers appealed to the House of Lords. Their Lordships allowed the appeal and held, *inter alia*, that "The effect of the phrase (WIBON) was to convert a berth charter party into a

port charter party but only in relation to a case where a berth was not available for the ship on her arrival; there was no good reason for applying that effect to a wholly different kind of case where a berth was available for the ship on her arrival but she was prevented by bad weather from proceeding to it ...

The phrase 'whether in berth or not' should be interpreted as applying only to cases where a berth was not available and not to cases where a berth was available but unreachable by reason of bad weather ..."

Interestingly, the provision "always accessible" attracted only moderate interest from the learned judges. It was only in the Queen's Bench decision that Webster J. commented on this point as follows by deciding, *inter alia*, that "The arbitrator's award must be set aside unless the owners could successfully rely on the words 'always accessible berth(s) each port'.

The word 'accessible' meant 'capable of being approached' in the sense of having unobstructed way or means of approach and the expression 'always accessible' was an adjectival description, descriptive of the berth, and meant only that the berth was capable of being approached.

The owners could not establish that the charterers were in breach of their absolute obligation to nominate a berth which was always accessible ..."

This point was not commented on by the Court of Appeal or by the House of Lords. It seems, therefore, that as things stand at the moment under English law, the expression "always accessible berth" apparently implies that it is qualified by, *inter alia*, navigational risks (e.g. fog preventing vessel from reaching the free berth).

■ Cancelling date passed - whether vessel must proceed to point of delivery

Enquiry: The vessel was delayed on previous employment and consequently she would not be able to deliver into new employment within the agreed cancelling date. Although owners kept charterers well advised of vessel's schedule, charterers did not reveal their intentions as to whether they would utilise their option of cancelling the charter.

As delivery into new employment involved ballast voyage, owners were, of course, eager to learn as early as possible whether charterers intended to cancel the vessel, thus avoiding having to send the vessel on a futile ballast voyage to point of delivery.

BIMCO's advice was sought by our member as to whether owners could compel charterers to disclose their intentions prior to sending the vessel in ballast to the agreed point of delivery.

Reply: It must be realised that, in the absence of provisions such as e.g. the first para. of clause 10 of GENCON C/P, charterers are not compelled to inform owners in advance whether they (charterers) intend to utilise their option of cancelling the charter.

Charterers do not need to declare their intention until vessel has reached the point of delivery or the port of loading, as the case may be. This is explained as follows in the handbook on maritime law entitled *A Handy Book for Shipowners & Masters* by H. Holman:

"**(A.)** A charterer cannot be required by the shipowner to exercise his option of cancelling the charter party before the ship has reached the loading port, (unless the charter party clearly provides otherwise), even though it be certain that she cannot arrive before the cancelling date (*Moel Tryvan v. Weir*, 1910)

(B.) Although a ship cannot get to the port of loading by the cancelling date, she is yet bound to proceed there, unless the delay caused by excepted perils is sufficient to frustrate the charter party.

(C.) The charterer is entitled to exercise his option to cancel at any time between the prescribed cancelling date and the date after the ship's arrival when the shipowner's right to require the charterers to load commences (per Kennedy L.J. in *Moel Tryvan v. Weir*, 1910)."

We are, therefore, afraid that unless charterers can be induced to declare their intention in advance, vessel will have to proceed to the agreed point of delivery even though cancelling date has passed.

GENCON C/P - commission on demurrage

Enquiry: Clause 14 of the printed text was deleted entirely and a rider clause states "Brokerage commission and to whom payable (Clause 14)" to which was added "2.5 per cent. address commission to Charterers plus 1.25 per cent. each to (us) and (Charterers' broker)". There is no other reference to this matter in either the printed form or the attached clauses.

Owners have claimed an amount due for demurrage against which an amount covering despatch earned by charterers. Thus there is a "net" claim in excess of USD 50,000.00 due to owners. Charterers have accepted owners' calculations in every respect but one, namely that charterers and their broker claim that demurrage should be paid net of 3.75%. We and owners have disputed this on the grounds that unless specifically mentioned in the C/P there should be no deduction made from demurrage rightly claimed by owners. Whilst this dispute continues, owners are in receipt of no balance from charterers.

BIMCO's advice was sought as to whether charterers in the circumstances were entitled to deduct commission from demurrage due to owners.

Reply: Starting with the ultimate paragraph of your enquiry there is absolutely no rationale for withholding an amount which is undisputed and, hence, charterers' non-payment of the amount which is undisputed is totally unwarranted.

When it comes to the question of whether or not commission is due on demurrage the answer is that commission on demurrage is not payable unless the governing C/P expressly so provides. In this context we refer to page 20 of this book and we also quote the following excerpt from a handbook on maritime law entitled *Scrutton on Charterparties and Bills of Lading*:

"The commission may be expressed to be payable on the freight, dead freight and demurrage, but, in the absence of such expression, 'Commission at ..... per cent.' will be payable on freight only (*Moor Line v. Dreyfus* [1918] 1 K.B. 89."

Deadfreight and laytime calculation

In view of an increasing number of enquiries concerning the above it is found worthwhile to reproduce an article on this subject which appeared in BIMCO Bulletin 2/86:

Enquiry: Members requested the BIMCO Secretariat to advise on the position in Britain as well as in U.S.A. with regard to laytime calculations in cases of deadfreight, i.e. if "time allowed" should be calculated on the basis of quantity of cargo on which freight is paid or on the basis of quantity of cargo actually loaded/discharged.

Reply: The position in U.S.A. is rather simple as can be seen from pages 8197-8198 of BIMCO Bulletin 5/85 where the discussion and decision of the arbitrators in American Arbitration Award No. 2107 is quoted and from which it follows, *inter alia*, that

"With respect to the calculation of laytime, the panel finds that calculation must be based upon the quantity of cargo for which freight has been paid. In so finding, we follow the same reasoning laid down in Buenamar, supra, which holds that the theory of deadfreight is to return Owner to the same position it would have been in had the full cargo been loaded, and to calculate laytime on a lesser quantity would be to unjustly enrich Owner."

The position in England is more complicated. The initial rule is simple: laytime must be calculated on the quantity actually loaded irrespective of quantity on which freight and deadfreight may be paid. Owners, however, should not be better off than they would have been had the breach (non-delivery for shipment of the contracted minimum quantity) not occurred which may involve some crediting in respect of demurrage/despatch, etc.

The leading judgement is the *Ionian Skipper*, Queen's Bench Division (C.T.) March 21 and 22, 1977, and this decision may be rooted in the following approach which can be found in a handbook on maritime law titled A Handy Book for Shipowners and Masters by H. Holman:

"The amount due to the shipowner for deadfreight is calculated by ascertaining the amount which might properly have been carried over and above the amount shipped, estimating the freight on the difference, and deducting the additional expense (if any) which the shipowner would have incurred if the difference had been shipped, carried and discharged."

In addition to the above we may add that as far as the position in France is concerned, it would seem that French arbitrators look at these matters in a similar fashion as their U.S. colleagues in that it was decided in a French arbitration award (No. 420 of 19 September, 1981), *inter alia*, that "But owners, cashing the whole freight as expected, must calculate laytime at ports of loading and discharging on the basis of the tonnage paid for and not on the cargo actually loaded".

"Free time" used for cargo work

Enquiry: The C/P stipulated that laytime for discharging will commence to count from 08.00 next working day after notice of readiness has been given within ordinary office hours. Notice of readiness was tendered Thursday afternoon (within ordinary office hours) and hence, laytime would commence to count the following Friday at 08.00 hours. However discharging commenced shortly after notice of readiness had been given and was completed one hour prior to

commencement of running of laytime, i.e. no laytime was in fact used. Owners claim that time used prior to commencement of running of laytime should count against laytime. The C/P is silent on the question of "free time" used, and stipulates that arbitration, if any, is to take place in London. BIMCO was requested to advise whether owners were correct.

Reply: From your enquiry it follows that the matter is governed by English law. It must be realised that unless owners can demonstrate that there was an agreement to the effect that "free time" used should count against laytime, either by way of express words in the governing C/P or that there was an agreement to vary the terms of the C/P to the effect that commencement of discharging prior to expiry of agreed notice time, then "free time" used for cargo operations would not count against laytime.

The same appears to be the position, for instance, in the United States and in Scandinavia, whereas the position may be more favourable to owners in, for instance, Germany. However the best solution is still to cover this point by clear words in the C/P for example by agreeing to a provision such as the one found in line 97 of GENCON reading: "Time actually used before commencement of laytime shall count".

Tendering notice of readiness prior to first layday

Enquiry: Vessel was fixed on voyage basis with laydays/cancelling 29 April (Sunday)/10 May. She arrived at loading port on 23 April and when all formalities had been complied with Master tendered notice of readiness on that day. Accordingly owners consider that laytime commenced to count as from 30 April at 07.00 hours in view of the fact that the governing C/P contains provision to the effect that laytime commences to count at 07.00 hours on the next working day after notice of readiness has been tendered.

Owners' viewpoint is contested by charterers who basically maintain that notice cannot be tendered and thus not accepted prior to the first layday which was a Sunday and consequently the next working day after notice of readiness is tendered within the ambit of the C/P terms would be 1 May at 07.00 hours. The C/P contains no provision according to which owners/Master is barred from tendering notice of readiness before first layday.

Reply: It is well-established that a notice of readiness may be tendered prior to the first layday unless the governing C/P expressly provides to the contrary. Previously issued BIMCO publications contain references to several pertinent arbitration awards deciding that nothing save express contractual stipulations can prevent owners/Master from tendering valid notice before first layday.

It is quite another matter that the C/P may prescribe that laytime can only commence to run at a given point in time on the first layday which is in fact the case here. However, such provision does not preclude that owners/Master may tender notice of readiness prior to first layday, but commencement of running of laytime would be deferred until the particular point in time on the first layday (in this case 07.00 hours) as prescribed in the C/P.

In the present case commencement of running of laytime was, however, additionally deferred due to the fact that the first layday was a Sunday and, hence, exempted from the running of laytime which was, therefore, further deferred until the following Monday (30 April) at 07.00 hrs.

In this context we refer to the recommendation which can be found on page 10 of this book with regard to checking whether the first layday is a Sunday or holiday.

Free time used v. time used in excepted periods

Enquiry: The vessel arrived at loading port Saturday at 07.55 hours. Notice of readiness was tendered on arrival and was accepted same day at 11.30 hours. Loading commenced the following day (Sunday) and was completed the following Thursday.

The dispute concerns from when laytime commenced to count and whether time used on Sunday should be considered time used prior to commencement of running of laytime or if it was time used during excepted periods.

The fixture was done on the GENCON C/P, and the pertinent provisions read as follows:

Line 97: Remain as printed except that time used is to count only half against laytime.

Clause 19: Time from Saturday 13.00 hours or 17.00 hours on a day before a holiday until 08.00 hours on Monday or next working day shall not count **even if used**.

Clause 32: At loading and discharging ports laytime commences to count from 2 pm if notice of readiness is given before noon and from 8 am following working day if given during office hours after noon. Notice of readiness to be tendered during office hours only; Monday to Friday 08.00/17.00, Saturday 08.00/13.00 hours... .

Charterers' viewpoint is that whereas time from 11.00 to 13.00 on Saturday is governed by line 97 and, hence, should count half against laytime, work carried out during the period from Saturday 13.00 hours until Monday 08.00 hours should be governed by clause 19, i.e. the time used does not count against laytime. Owners hold the view that time used for cargo operations during the period Saturday 11.00 hours/Monday 08.00 hours is governed by line 97, i.e. time used should count half. BIMCO's advice was sought as to whether owners or charterers were right.

Reply: First of all it should be kept in mind that a distinction must be made between time used before commencement of counting of laytime and time used during periods excepted from laytime, the latter applying only once laytime has commenced to count.

In the present case the sequence of events is as follows: Notice of readiness was given in accordance with the provisions of clause 32 on Saturday thus triggering off running of the agreed notice time. We cannot quite make out why the charterers hold the view that the two hours (11.00 to 13.00 hours) on Saturday should count half against laytime. Notice time expired on Saturday at "2 pm". However, clause 19 prevented laytime from commencing to run at that moment in time or, to put it differently, commencement of running of laytime was **deferred** "until 08.00 hours on Monday".

Accordingly, the time used for cargo operations on Sunday was time used before commencement of counting of laytime and, hence, governed by line 97, i.e. it should count half against laytime.

About "about"

Since time immemorial the word "about" has been a constant feature in the shipping industry. In the nature of things one can envisage a multitude of situations in which a certain imprecision (or perhaps, flexibility) is required.

On the other hand, such imprecision certainly also has its disadvantages when, in case of dispute, the time comes to construe this comparatively insignificant and yet quite significant word....

The disputes with which the Secretariat is confronted predominantly concern quantity of cargo under voyage charterparties and speed and consumption under timecharter and occasionally in relation to period of hire when a vessel has been fixed for a time charter **trip** for "about so and so many days". With regard to the latter readers are referred to the item entitled *Timecharter Trip "About... Days Without Guarantee"* on page 132.

The first difficulty is that the vagueness of the word "about" prevents a strict interpretation or application of rigid rules of construction as illustrated by the following which can be found in the handbook on maritime law entitled *Handy Book for Shipowners & Masters* by H. Holman:

"Vague words such as 'about' are not easy to construe exactly. Usually these days they are taken to cover a margin of 5 per cent. either way, but this is not a rigid rule and each case must be considered on its own merits."

The author goes on to list a few cases illustrating the different decisions reached in different cases concerning "about" in relation to quantity of cargo, ranging from three to five per cent. either way and also referring to a case in which "about" was decided to imply a specific quantity.

Another aspect of uncertainty as regards voyage chartering is when parties have agreed to e.g. "about 10,000 metric tons" but without stipulating in whose option the actual final quantity should be. Hence, owners would not know whether they could expect that up to 10,500 tons cargo would be delivered to the vessel and charterers would not know whether they had fulfilled their contractual obligations by supplying minimum 9,500 tons. A difference of 1,000 tons cargo has quite some effect on a voyage calculation. Not to mention the delay which may be incurred when come Friday afternoon the vessel has loaded, say 9,800 tons and charterers advise that they will supply additionally "about 150/200 tons" the following Monday.

Although it is we think generally recognized that the margin should be in owners' option, the only way to achieve certainty on this point is to ensure that the contract clearly stipulates that the margin is in owners' (or charterers') option.

Better still, instead of using the word "about", parties should agree to describe the quantity - for instance, "10,000 metric tons 5 per cent. more or less in owners' option" (or in charterer's option as the case may be) thus doing away with the possible subsequent discussion/dispute on this point. When it comes to speed and consumption under time charter the word "about" is more often than not found in connection with speed and/or consumption warranties.

Broadly speaking it may be said that the shipping profession has adopted a "rule of thumb" that as far as vessel's speed goes "about" means half a knot downwards from the speed stated

and on the consumption the word means 5 per cent. upwards from the consumption stated in the charter party.

Does this then mean that an owner would be entitled to reduce the warranted speed by half a knot and increase the warranted consumption by 5 per cent. when "about" appears in connection with speed as well as consumption warranties thus enjoying what may be termed a "double benefit"?

First of all it should be kept in mind that such "rules of thumb" have only moderate (if any at all) legal bearing, and, hence, it is the circumstances of the particular case which will determine whether such "rules of thumb" have indeed any bearing at all on the particular case and whether they should be taken into account. Secondly, authority seems to be divided on the question of "double benefit".

For instance, in S.M.A. No. 2040 the panel decided that when the speed warranty in the C/P was stated as "about 14.5 knots" the basis to determine the warranted speed should be set at 13.7 knots (i.e. 0.8 knots downwards), but with regard to the consumption the panel held, *inter alia*, that "the word 'about' in describing bunker consumption is not another 5 per cent. on top of that allowance for speed...". i.e. owners should not enjoy the "double benefit" of a downwards margin on speed as well as an upwards allowance on the warranted bunker consumption.

The tribunal in an English arbitration award* reached the same conclusion in that it was held that "since speed and fuel oil consumption were so closely and directly related, the tribunal's view was that the daily consumption should be reduced so that, in effect, the owners did not get what might otherwise be described as a double benefit."

Representing a different view is the renowned U.S. arbitrator, the late George T. Stam who, in his lecture "Speed and Consumption Warranties in Time Charters" writes, *inter alia*:

"If the clause contains the word 'about', a downwards allowance is applied for determining the criterion of good performance...."

and

"If the word 'about' in the charter party is before the speed only, I do not believe that it should have a bearing on the consumption. The allowance given for "about" on speed covers indirectly a logical allowance on consumption.

If the word 'about' is mentioned before the consumption also, I estimate a 3% allowance to be adequate."

This view was adopted in a London arbitration** in which the arbitrators held, *inter alia*:

"that on an ordinary, straightforward and natural reading of the speed and consumption warranties, since the word 'about' was used in relation to both, it should be applied to both."

** London Arbitration 6/88 ** London Arbitration 12/85*

A similar view was adopted in another London arbitration award* in which it was held that "some margin for the word 'about' had to be applied not only to the speed, but also to both the consumption figures given in clause 47." Accordingly, matters remain unsettled as far as speed and consumption under time charter goes, and whilst there is merit in both approaches to these matters as illustrated by the different decisions briefly mentioned above, a more balanced solution still may be that the word "about" is used in connection with either speed or consumption.

Yet another type of dispute (although comparatively rare nowadays when parties more often than not agree on specific laydays/cancelling) is when the word "about" is used in the context of vessel's load readiness such as, for instance, "expected ready to load about 15/18 November".

In an English judgement rendered in 1938 the Court submitted that "expected ready to load about 15/18th November" meant not earlier that 15 November nor later than 18 November, with a possible two or three days' grace either way.

As will be seen from the above it is not immaterial how and in which context the word "about" is used and readers should keep the above comments in mind so as to attempt as far as circumstances permit to reduce the uncertainties which are intrinsic in vague words such as "about".

** London Arbitration 2/87*

Freight payable at destination

Enquiry: Parties agreed to the provision "Freight payable at destination". Upon completion of loading owners issued their freight invoice which charterers did not dispute as such but they said that in view of the freight payment agreement they were not obliged to pay the freight until vessel arrived at the discharging port ready to deliver the cargo. Owners maintained that as the above stipulation does not prescribe when freight is to be paid they are entitled to freight being paid by charterers on receipt of owners' freight invoice. BIMCO's advice was sought as to whether owners or charterers were right.

Reply: Although owners' are right with regard to the above provision not expressly stating actually when payment of freight falls due it should, however, be kept in mind that, in principle, and in the absence of express words to the contrary, remuneration for a service rendered is only due once that service has actually been rendered.

As regards voyage freight "payable at destination" the general position is that unless the contract stipulates otherwise then freight is to be paid concurrently with delivery of the cargo at port of discharge, i.e. charterers are not compelled to pay freight prior to that point in time. This is explained as follows in a handbook on maritime law entitled *A Handy Book for Shipowners and Masters* by H. Holman:

"If the contract of carriage does not state when the freight is to be paid, the law implies an agreement to pay concurrently with the cargo's delivery at the port of discharge (*London Transport Co. v. Trechmann*, 1904)."

"The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law

of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant" (Per Willes J. in *Dakin v. Oxley*, 1864)."

Editor's Note: As will be seen from the above - and apart from the obvious disadvantage of having to wait, perhaps even for quite some time for the freight in case of a long voyage - it is the shipowners who under the "freight payable at destination" stipulation hold the "freight risk" in that they are not entitled to the voyage freight if the vessel, for instance, is lost en route and thus does not reach the contractual destination. Readers are referred to the summary of the *Karin Vatis* Court of Appeal judgement which appeared on page 9259 of BIMCO Bulletin 4/88 and to BIMCO's recommendations with regard to freight payment arrangements which can be found on page 11 of this book.

■ GENCON C/P "acceptance" of N.O.R. - shifting time

Enquiry: Charterers disputed owners' laytime computation on two points:

- Acceptance of notice of readiness
- Time used shifting from anchorage to loading berth.

Charterers held the view that a notice of readiness was only valid when accepted, claiming that that was "a universally accepted practice" whereas owners maintained that the time of giving the notice as per clause 6(c) should be decisive.

On the question of shifting from anchorage to loading berth charterers adopted the view that since time used for shifting is time that they cannot use under any circumstances it should not count against laytime and, moreover, it should in charterers' view be considered as part of the voyage and that "it is the universal custom to deduct this time from the time used if the shifting takes place after the commencement of laytime". Owners maintained that shifting is not excepted from running of laytime unless the governing C/P contains adequate provision to that effect.

BIMCO's advice was sought in an effort to settle the dispute.

Reply: Initially we would say that we are not aware of any rigorous internationally accepted custom or understanding to the effect that "notice of readiness is only valid when accepted", nor are we aware of any "universal custom" that shifting time as a rule is deducted from laytime. As a matter of fact, the position is quite the opposite - on both points.

Giving notice of readiness is a one-sided act on the part of the Master/owners. It requires no "acceptance" unless the governing C/P expressly so provides. The point is that on receipt of a notice charterers must expect that the vessel is in a contractual state, ready to receive or discharge the contracted cargo. If it subsequently turns out not to be the case, then the notice given was invalid. Hence, "acceptance" of the notice is, in principle, superfluous. It goes without saying that charterers may refuse a manifestly invalid notice of readiness. Even if the governing contract stipulates that the notice is to be "accepted" there must be a strong and valid reason for refusing the notice, i.e. a provision to the effect that the notice is to be "accepted" cannot be used as a pretext to defer "acceptance" of an otherwise valid notice until such time as charterers see fit.

When it comes to shifting from waiting place to berth after commencement of counting of laytime, then the general position is that such shifting time is not excepted from running of laytime unless the governing contract expressly so provides. In this context, the following excerpt from an article which appeared in the BIMCO Annual Report 1982-83 is relevant:

"**Shifting time**. - A problem which is closely related to that of shifting costs is the question of counting of shifting time. From a number of disputes of this nature which have been submitted to the BIMCO Office it transpires that in many cases charterers contend that all shifting time falls to be excluded from the laytime.

This is not correct.

A clear guidance on this problem, at least as far as English law is concerned, was given by the Queen's Bench Division (Commercial Court), London, in 1977 in the *Schackleford* Case (1978, Lloyd's Law Report, page 191, Vol. I).

For the convenience of members, the position as it now stands under English law may be summarised in the following:

Firstly, as long as the vessel is not an arrived ship the question of exclusion of shifting time does not arise simply because as long as the vessel is not an 'arrived ship' laytime counting cannot be initiated.

Once the vessel has become an arrived ship and may tender notice of readiness so that laytime may begin to count, the laytime runs continuously save for the periods expressly excluded from laytime counting according to the charterparty. However, normally shifting time is not considered as an excepted period and, as established in the Schackleford Case, time used for shifting may only be excluded from laytime counting in the following circumstances:

(i) If it constitutes excepted time under the terms of the charterparty, i.e., that the charter by clear and express terms excludes shifting time from counting of laytime;

(ii) By the custom of the port always provided that the custom does not conflict with the terms of the charterparty. Thus, if there is such a conflict, it will mean that the charterparty terms will prevail, any custom of the port notwithstanding;

(iii) If the shift is made for shipowners' own purpose and convenience, for instance, in order to bunker or perform repairs and provided the shift occurs at a time or in circumstances which deprive the charterers of the use of the vessel, i.e., that the vessel is withdrawn from the immediate and effective disposal of the charterers;

(iv) If the shift occurs after laytime has expired, the doctrine of once on demurrage always on demurrage prevails so that shifting occurring at a time when the vessel is already on demurrage may only be deducted if expressly provided for in the charter.

The judgement by the Queen's Bench Division was later confirmed by the Court of Appeal. In respect of time used for shifting to berth after expiry of laytime, arbitrators in New York have in two recent awards re-affirmed the principle explained above that when laytime has

expired such shifting time is to count as time on demurrage. Both disputes involved an oil tank vessel, one fixed on the Exxonvoy 1969 Charter and the other on the Mobilvoy Charter."

Outcome: The Secretariat was pleased to receive the following from the members:

"Your message was passed on to the charterers and we are very pleased to advise you that charterers have accepted the owners' standpoint on the two issues and have finally settled outstandings accordingly."

■ Breakdown of shore appliances - whether laytime is suspended

The Secretariat is fairly frequently confronted with enquiries pertaining to whether or not temporary breakdown(s) of shore appliances which may be caused by wear/tear and/or lack of maintenance should be excepted from the running of laytime.

BIMCO has consistently expressed the view that breakdown of shore loading (or discharging) installation caused by wear/tear and/or lack of maintenance is a fairly common occurrence which does not affect counting of laytime. Sometimes charterers adopt the view that laytime should be suspended because the breakdown is tantamount to an "accident", an exception found in many exception clauses. It is submitted that an accident must be an event of a more severe nature than a simple breakdown.

In *The Provident Life & Accident Insurance Co. v. Hanna*, 311 S. 2d 294 judgement the Supreme Court of Alabama adopted the view that "an accident is an occurrence that is not to be expected or anticipated in the light of common experience and of the existing circumstances". Temporary breakdown(s) of shore installations caused by wear/tear or lack of maintenance does not have the characteristic of "accident" within this construction.

The "difficulty" in these matters is that usually the amount of money does not warrant that the case be submitted to arbitration. However, in a fairly recent New York arbitration award* this question was part of a number of disputes concerning laytime and demurrage computation. At the loading port the reclaimer on two separate occasions failed to work resulting in a total loss of time of one hour and twenty minutes. It was held by the panel that "The terms of the charterparty are 'free in and out' (FIO) to owner and therefore disruptions of loading caused by the malfunctions of shore equipment is clearly for charterer's account."

Time used to conduct draft checks during loading

In the same category is the question of whether temporary interruption(s) of loading operations to check vessel's draft would justify suspending of counting of laytime for the time so used.

The Secretariat invariably holds the view that provided the time used for such draft check(s) is reasonable in the circumstances laytime is not suspended. This position was commented on as follows in an article which appeared in BIMCO Annual Report 1980-1981:

"A vessel of about 75,000 tons dw. was fixed to load a cargo of about 60,000 tons of grain at a berth on the River Mississippi.

** S.M.A. No. 2701*

Towards the end of the loading operations, the Master stopped the loading on two occasions each lasting 15 minutes, in order to check the vessel's draft so as to ensure that the vessel would not exceed the required draft limits.

The charterers claimed that owners were responsible for the cost of labour charges paid to stevedore labourers for the period the vessel was idle for taking draft. The claim was repudiated by the owners on the grounds that draft checking was part of the cargo work required for the vessel to maintain required draft limits.

The owners who also sought the opinion of BIMCO in the matter, were advised that in similar disputes in the past, BIMCO has invariably expressed the view that necessary stoppages for the purpose of checking vessel's draft to determine the amount of cargo still to be loaded and to ensure that draft limits are not exceeded, do not interrupt laytime unless the charterparty provides otherwise, always assuming that the time taken is reasonable. In determining whether the time taken is reasonable or otherwise, such factors as the size of the vessel and the nature of cargo loaded must be considered. For instance, it is well known that cargoes such as ore and grain may be loaded at a very high speed.

Consequently, BIMCO could fully support the owners that a stoppage of 2 x 15 minutes at the very end of the loading operations to check draft for a vessel of about 75,000 tons loading grain on the River Mississippi did not seem to exceed the test of reasonableness referred to above.

Consequently, there could be no question of suspension of laytime, nor could owners be held responsible for the cost of labour charges for detention of vessel for checking draft. Whenever disputes of this nature should arise, the parties should be guided by the principles explained in this article."

As it happens this question was also included in the points in dispute in the New York arbitration referred to above.

During loading operations cargo loading surveys were performed. Total time used was two hours and twenty minutes. On this point the panel held that also for charterer's account "are the cargo surveys which were conducted in order to establish the quantity of cargo loaded onboard in compliance with charterer's requirement and in order to establish Bills of Lading weights for payment of freight."

It is comforting to ascertain that the unanimous decision of the panel in the above-mentioned arbitration award on both points confirmed the views in these matters as hitherto advocated by BIMCO.

Statements of Fact

The Secretariat has been confronted with cases in which no entries were made in the Statement of Facts as to weather conditions which may have affected cargo operations. There was a simple statement to the effect that "weather conditions are as observed by the meteorological office".

Obviously this is a perfect dispute-breeder. First of all, because a report from the meteorologi-

cal office contains no information as to whether or not weather conditions actually interrupted cargo operations, and, secondly, the meteorological office is not necessarily situated in the port area, i.e. the meteorological report records weather conditions somewhere else and cannot, therefore, be used as evidence on which laytime computations could be based.

Even if the meteorological office is actually situated in the port area, it does not usually contain any other information than what relates to the weather, i.e. it is only circumstantial evidence from which it may or may not be inferred that cargo work may have been affected.

A Master confronted with such a Statement of Facts **should not sign** the document without expressing his reservations (as he may express his reservations to the contents of a Statement of Facts which is otherwise issued in the correct fashion if he disagrees with the contents of same).

The approach to issuing a Statement of Facts as outlined above complicates rather than simplifies matters, and there is no substitute to meticulous noting of **all** relevant facts therein pertaining to vessel's stay in port and that the Statement of Facts is subsequently **signed** by the parties involved.

■ "Sub stem" fixture

Enquiry: We had fixed a cargo basis "sub stem". There were no other outstanding points. Subsequently, charterers however dropped the business claiming that receivers' approval could not be obtained. We refused the view adopted by charterers as the recap stipulates only "sub stem" and not "shippers'/receivers' approval". In view of the above, please enlighten us on the following points:

1) Do "sub stem" and "sub stem, shippers'/receivers' approval" give the same meaning?

2) The other party allege that the phrase "sub stem" stands for (in short) "sub stem, shippers'/receivers' approval" which we think is not correct.

Reply: There should be no doubt that "sub stem" **does not** encompass receivers' approval. If such subject is required it must be expressly mentioned. From the article which appeared on pages 8679/8680 of BIMCO Bulletin 1/87 you will note that the term "sub stem" was originally used only when coal cargoes were fixed. The charterers needed the confirmation from the mines and shippers that the cargo was available at the material time, i.e. within the agreed laydays. Some guidelines as to the proper use of the reservation "sub stem" can be found in Recommended Principles for the Use of Parties Engaged in Chartering and Ship's Agency Procedures (quoted in the above article) as follows:

"The restriction 'subject stem' can only apply to shippers' and/or suppliers' agreement to make a cargo available for specified dates, to the exclusion of any other meaning. In case of stem not granted as required, no other ship can be fixed by Charterers before the one initially fixed 'subject stem' has received the first refusal to accept the amended dates and/or quantity, provided they are reasonable near." (underlining by BIMCO)

and

"Any other 'subject' to be clearly stipulated and limited and to be eventually properly justified."

Accordingly, the first of the above questions should be answered in the negative and, hence, you are correct in assuming that the meaning of "sub stem" as alleged by the other party and as outlined in point 2) above is wrong.

Waiting for cargo documents after completion of loading

Enquiry: After completion of loading of a cargo of bulk cement the vessel was delayed overnight for the purpose of ascertaining quantity loaded and issuance of cargo documents. Owners have included this waiting period in their laytime computation whereas charterers claim that since the governing charterparty is silent on this point laytime ceases to count on completion of loading, i.e. the time spent waiting for cargo documents should not count against them.

Reply: Charterers are correct in maintaining that laytime or time on demurrage (as the case may be) ceases on completion of cargo operations. Charterers are thereafter allowed a "reasonable time" to prepare and bring on board cargo documents. If the vessel is delayed beyond such "reasonable time", then owners may claim damages for detention for the excess period.

The difficulty is, however, that there is no objective yardstick to measure what may be considered "reasonable time" in the circumstances and, hence, each case must be considered on its own merits. The basic principle has been explained as follows in a handbook on English maritime law entitled *Scrutton on Charterparties and Bills of Lading*:

"Where it is duty of the charterer to present bills of lading for signature, he must do so within a reasonable time from completion of the loading, even if that is completed before the lay-days expire. If the ship is detained in port by his delay in doing so the shipowner can recover his actual loss as damages for detention, and his claim is not limited to either (i) the demurrage rate fixed by the charter, or (ii) an abatement from dispatch money payable to the charterer."

We are aware of an arbitration award in which it was decided that three hours for preparing/delivering cargo documents were "reasonable". It could be envisaged, however, that more than three hours may be considered "reasonable", for instance, in a situation where the vessel has loaded general cargo for which several sets of Bills of Lading have to be issued for several discharge ports.

If, however, "unreasonable time" has been used then charterers may be charged with the **whole** period from completion of loading and until vessel is able to sail as illustrated by an arbitration award rendered in London in 1989. In that case vessel's departure was delayed for some ten to twelve hours because Master (rightfully) insisted on endorsing the Bill of Lading with regard to condition of the cargo which, however, required some discussion between shippers and charterers thus resulting in the excess delay in vessel's departure.

The tribunal held that charterers were liable in **damages** for the **whole** period from comple-

tion of loading and until vessel was able to sail. The trend followed by New York arbitrators seem to disallow any time at all to charterers/shippers to prepare and bring on board cargo documents. This can be illustrated by the following excerpt from S.M.A. No. 2480 in which it was held, *inter alia*, that

"Time lost awaiting cargo documents is for Charterer's account. This has been a consistent and logical view of New York arbitrators and it is supported by a mass of previous decisions (citing three awards reaching similar conclusion).

It doesn't really matter whether the time differential is lengthy or short, reasonable or otherwise, that period is for Charterer's account."

■ GENCON C/P - discharging into barges - weather hindrances

Enquiry: At the discharging port the vessel had to discharge part of the cargo into barges. It was agreed that time and expenses should be absorbed by the charterers. Laytime was based on "weather working days" and the charter party contained no provisions specifically regulating the discharge into barges. In the course of discharge into barges there were long delays because the barges were prevented from approaching the vessel due to dense fog.

Charterers maintain that the fog is an element of weather and since adverse weather falls within the weather exception the delays would be deductible from laytime.

Owners on the other hand held the view that insofar as the actual discharging operation from ship to barges was not prevented and only the movement of barges to/from the vessel was prevented by the adverse weather conditions, laytime should count unabated. BIMCO's comments were sought as to whether owners or charterers were right.

Reply: Owners are correct in maintaining that since their responsibility ends with the delivery into the barges, the decisive question as far as the vessel is concerned is whether or not weather conditions prevent the actual discharging from the vessel into the barges. If these operations are not (or would not have been) interrupted then running of laytime is not interrupted. Although the barges may be unable to discharge their cargo at a particular place without difficulty this will not affect running of laytime.

As mentioned, the responsibility of the vessel ends with the delivery of cargo into the barges and this may continue irrespective of the dense fog preventing the barges from navigating to/from the vessel, and if this is the case then running of laytime is not interrupted. Consequently, unless charterers can demonstrate that the fog interrupted (or would have interrupted) discharge from the vessel into barges then laytime would run uninterruptedly.

■ "Prior entry" versus "final entry" at Indian ports

Readers are referred to the summary of the *Antclizo* judgement which appeared on pages 25-26 of BIMCO Bulletin 4/91 concerning the question of "prior entry" versus "final entry" at Indian ports. The High Court held that "entry at Customs House" meant on receipt of "prior entry" at Bombay. Charterers appealed to the Court of Appeal which, however, upheld the decision reached by the High Court. Accordingly, there is now authority to the effect that a

vessel is "entered at Customs House" at Bombay within the meaning of clause 34 ("..vessel also having been entered at Custom House and in free pratique...") of the charter party on completion of "prior entry". Hence, the decisions in the *Albion* and the *Nestor* (summarized respectively in BIMCO Bulletin 4/87 and BIMCO Bulletin 6/87) to the effect that a vessel was only entered on "final entry" **are now overruled**.

Incidentally, a similar decision was reached by the High Court of Bombay in the *Jag Leela* judgement which is summarized on pages 24-25 of BIMCO Bulletin 2/89.

Settlement of balances

Another issue arose which was payment of balance and construction of the word "settlement" as per clause 29 of the charter party which read as follows:

"....Ninety per cent. freight to be paid within seven days of signing bills of lading... The balance freight will be paid after completion of discharge and settlement of demurrage/despatch..."

The voyage giving rise to the dispute was executed in 1973. Arbitrators were appointed in 1975 but the first steps in the arbitration were taken in 1983. Up until the Court of Appeal judgement (April, 1991) owners had thus been kept waiting for their money for no less than 18 years! In the arbitration the umpire concluded that

"the cause of action for the balance of 10 per cent. freight only accrued on the publication of this award since the word 'settlement' in clause 29 meant 'agreement of determination'."

This conclusion was upheld by the High Court. Owners' appeal was dismissed by the Court of Appeal. The Court of Appeal held *inter alia* that:

"Where the charterparty provided that the balance of freight should be paid 'after completion of discharge and settlement of demurrage/despatch on production of a paid voucher from the charterers' broker...', the obligation to pay the balance of freight only arises after the net demurrage/despatch due has either been agreed or determined.

(In the present case, the net demurrage/despatch due had not been agreed, and was accordingly determined when the umpire made his award.

The Court of Appeal held that even though the owners had been kept out of their money for 18 years, they were not entitled to interest on it.

The owners could have required a provision in the charterparty that the balance of freight should become due 'after settlement of demurrage/despatch or - months whichever is the earlier')."

Editor's Note: Whilst it is gratifying that the *Nestor* and *Albion* judgements have been overruled, the decision with regard to payment of balance of freight, etc., has indeed highlighted the need "to distinguish between straightforward freight payment clauses and clauses which will land you in trouble", as recommended in Chapter 1 of *Check before Fixing!*"

The above is in part a summary of the Court of Appeal judgement which appeared in Lloyd's Maritime Law Newsletter No. 322 of 7 March 1992 and which is reproduced by kind permission of the publishers, Lloyd's of London Press Limited.

"Office hours" for the purpose of tendering notice of readiness

The BIMCO Secretariat is frequently confronted with disputes on laytime which essentially centre on whether or not there were "office hours" at a given point in time for the purpose of tendering notice of readiness at the particular port.

It is not always easy to ascertain what may be considered "office hours" at a given port because they are, to some extent an individual question in the sense that whereas there may be a particular period within which **all** shipping-related offices are open for business still, there may be offices which for reasons of their own observe slightly longer or shorter "office hours", indeed "office hours" may vary from port to port in the particular country. These are some of the reasons why "office hours" are not listed in the BIMCO Holiday Calendar.

It should be kept in mind that working hours and "office hours" need not necessarily coincide. We think we are correct when we say that more often than not "office hours" at a particular port may commence and end later than the working hours (in terms of stevedoring) of the port.

BIMCO is of the consistent opinion that "office hours" for the purpose of giving notice of readiness mean the "office hours" during which the **majority** of shipping - related offices at the particular port are open for business, even with skeleton staff attending.

If it were otherwise, it would lead to an untenable state of affairs where one would have to determine "office hours" in relation to whether or not a particular office would be open or closed regardless of whether all other (or the majority of) shipping-related offices were open or closed at the material time.

This is, in our opinion, illogical. One may envisage a situation at a particular port in which shipping-related offices may be open for business say from 09.00 to 18.00 hours Monday through Friday and say 09.00 to 13.00 hours Saturdays but there may be a few offices which are open for business, say, from 08.30 to 17.30 hours, respectively, say, 08.30 to 12.30 hours, or one could envisage a variety of other combinations.

Accordingly, there would be a "core" of "office hours" from 09.00 to 18.00 hours, respectively 09.00 to 13.00 hours, within which the majority of shipping-related offices would be open for business, i.e. "office hours" which would then be to some extent affected by decisions of the individual offices to hold slightly different "office hours", but the period during which the majority of shipping-related offices are open for business would comprise "office hours" for the purpose of tendering notice of readiness at the particular port.

In the example outlined above this would be Monday through Friday 09.00 to 18.00 hours and Saturday 09.00 to 13.00 hours. This being so, a notice given, for example, Friday at 17.45 hours would thus have been tendered within "office hours" even if the particular recipient of the notice for reasons of his own had chosen to close the office at say 17.30 hours because the majority of shipping-related offices would be open until 18.00 hours.

A related problem is when the notice is given at noon sharp in the context of charter party provisions such as clause 6.(c) of GENCON, the salient part of which read as follows:

"Laytime for loading and discharging shall commence at 1 p.m. if notice of readiness is given before noon, and at 6 a.m. next working day if notice is given during office hours after noon."

Frequently parties do not see eye to eye as to whether a notice given at 12.00 hours sharp is given **before noon** or **after noon**.

The BIMCO Secretariat invariably holds the view that, obviously, 12.00 hours, i.e., noon, is a threshold line but certainly not a "no man's land" in the context of tendering notice of readiness. It is logical to consider that a notice given **after** 12.00 hours is given "after noon" whilst a notice given until **and including** 12.00 hours is given "before noon".

To maintain that 12.00 hours sharp is "after noon" is artificial and illogical bearing in mind that the purpose of a notice clause is that charterers/shippers/receivers should be given a fair notice time respite.

Change of destination

In view of the increasing number of inquiries concerning the above, BIMCO thinks it is worthwhile to submit a few comments on this point.

For a variety of reasons charterers may request owners to accept that vessel proceed to another (discharge) port than stated in the Bill of Lading. Although parties may, in the majority of cases, manage to reach an agreement as to remuneration to owners for such deviation, still there are situations in which things do not run as initially planned.

For instance, the Secretariat was recently involved in a case in which receivers told the charterers that they would prefer discharge at a different port because the port named in the Bill of Lading was congested. Charterers in turn asked owners who agreed and ordered the vessel to the other port.

When owners subsequently demanded payment of extra expenses incurred, charterers argued that since it was the receivers and not charterers who had requested the deviation they did not feel inclined to pay. To avoid such a situation the following points should be kept in mind:

1) If the discharge port is named in the charterparty, or if charterers have the option of nominating a port out of a list of ports, then once they have named the port, the situation is the same as if the port was named in the charterparty; Charterers have no contractual right to change the named or nominated port without owners' consent.

2) Charterers may, of course, request owners' co-operation in this respect, but owners are not obliged to consent and they may impose terms which in their opinion reasonably reflect the services required, as a condition for their consent.

3) The terms which owners may require vary, of course, but one condition should invariably be observed and that is that the Bills of Lading initially issued should be returned to owners so

that they may be replaced by others amending the destination. Owners should always contact their P&I Club in such a situation.

4) In order to avoid subsequent, protracted discussion on the terms which owners may require in exchange for complying with charterers' request, charterers' acceptance of owners' terms (or as may be negotiated) should be obtained before vessel is ordered to proceed to the alternative port.

Although in a slightly different context, readers may still find useful guidance in the *Saronikas* judgement, summarised on pages 8439-8440 of BIMCO Bulletin 3/86, in which it was held, *inter alia*, that the position was that the charterers requested the owners to perform services outside the terms of the charterparty - that was to say, services which the owners were not obliged to perform under the charterparty - and the owners acceded to that request in circumstances in which both parties recognised that for such services the owners should be remunerated. The owners were therefore entitled to recover reasonable remuneration on the basis of an implied contract to pay such remuneration for such services.

Furthermore, reasonable remuneration for services performed extra-contractually was not to be measured by looking at what might or could have happened if the services had never been requested at all. In a business context such as this, the question of remuneration was to be approached by asking what would be a fair commercial rate for the services provided outside the charterparty - i.e., for the owners' agreement to the use of the vessel as, in effect, a mobile floating warehouse off Aqaba for some nine days, Whether or not those nine days would have been, or might have been, or could have been employed by the charterers during laytime had they not made the request, was wholly beside the point.

■ Tendering NOR before first layday

The Secretariat is frequently confronted with disputes concerning the above. There are two aspects to this matter:

1) Giving notice of readiness

2) Commencement of counting of laytime on first layday.

Usually, charterers hold the view that notice of readiness cannot be given before first layday, but if they actually concede that notice may be given prior to first layday then they opine that the notice time to which they are entitled cannot commence to run until first layday. Neither of these views are correct.

Basically, one may say that the fallacy of charterers' viewpoint is that they do not differentiate between the act of giving notice of readiness and when laytime could commence to run. Although giving of notice of readiness is usually a prerequisite for initiating running of laytime, still, the vessel may well be ready even well in advance of the agreed laydays. This does not, however, mean that laytime automatically commences to run before the first layday or that charterers are deprived of the agreed notice time.

Consequently, the sequence is that notice may be given at any time prior to the first layday.

Such a notice of readiness, assuming that it is otherwise valid, triggers off running of the agreed notice time. If the notice time expires before first layday then commencement of running of laytime is deferred until the earliest allowable moment on the first layday.

Some charterparties prescribe that laytime commences to count at a certain moment of first layday (e.g. "Norgrain 89" clause 4) but in the absence of such express stipulation the earliest allowable moment on first layday is 00.00 hours. In a London arbitration award summarized in Lloyd's Maritime Law Newsletter No. 103 of 13 October 1983 it was held *inter alia* that:

"It was often thought that a notice of readiness could not be given before the commencement of laydays under a charter, but that was incorrect unless there was an express provision to that effect. In the absence of such a provision, a valid notice might be given at any time, but the laytime itself could not commence before the date given in the charter."

A similar decision was reached in the London arbitration award summarized on page 20 of BIMCO Bulletin 3/92 and there are several other arbitration awards rendered in London, as well as in New York, upholding this position. This being so, the general position is, when the charterparty does not contain express provisions governing matters differently, that:

- Notice of readiness may be given at any time before first layday
- Charterers are entitled to the agreed notice time which may, however, run and expire before first layday
- Laytime will not commence to count before first layday.

Waiting for cargo

Enquiry: The vessel was fixed basis laydays/cancelling 6/10 August. She arrived at loading port 8 August. On 10 August Master called owners and informed them that according to the port agent the shipment had been cancelled by the shippers.

Owners immediately contacted charterers who advised that they would send a representative to loading port to sort out the problems and they instructed owners to keep vessel waiting.

Charterers' representative was scheduled to arrive at loading port 12 August. So, vessel has already been waiting for four days and owners like to know to do about this matter.

Reply: Two situations should, in principle, be observed:

A) Charterers clearly express in words and/or action that they intend to comply with their contractual obligation to supply cargo for shipment.

B) It is apparent that charterers do not intend to supply cargo for shipment thereby repudiating the charterparty.

A situation under A) above is comparatively straight forward; the vessel must wait until the cargo is made available for shipment (assuming this can he achieved within a reasonable

time). In so far as charterers are entitled to the laytime they have "bought"*, laytime will count in accordance with the relevant terms and conditions contained in the charterparty and if laytime is exceeded then owners' remedy is to claim demurrage thus incurred, i.e. owners cannot claim damages or detention.

If, however, the circumstances fall under B) above then matters are more complex. In principle, the vessel must wait, but if it is obvious that no cargo will be supplied then owners are entitled to order the vessel to sail and claim damages flowing from charterers' non-adherence to the contract. Unfortunately, it is probably the exception rather than the rule that such a situation is as clear cut as one would wish it to be.

Whereas charterers may have the best intentions and, hence, attempt to straighten out matters enabling them to supply the cargo, and, "hoping for the best" they do not wish to expose themselves to a claim from shipowners therefore they may be somewhat hesitant to submit an unequivocal statement to the effect that no cargo will be supplied for shipment. In such situation owners must be very cautious and not order the vessel to sail too soon.

The point is that if owners do so, charterers may be able to resist a claim in damages from owners by maintaining that they were eventually able to and would have supplied the cargo but that it proved to be an idle exercise because the vessel had left the loading port. This would in effect turn the tables in that owners may then be exposed to a claim from charterers for breach of contract having ordered the vessel to sail although cargo could have been made available!

Unfortunately, there is no magic formula which would once and for all solve this problem; much will depend on the circumstances of the particular case. Circumstances may be so that it is apparent that no cargo will be supplied meaning that owners may be able to reduce the waiting time and, hence, mitigate damages. If, however, the circumstances are more blurred then owners should pause because the longer they postpone their decision the more certain they will be of establishing whether cargo is likely to be supplied or if charterers' conduct amounts to repudiation of the contract. As indicated above it is a difficult decision which owners have to make and which decision is the right one will to a large extent depend on the circumstances. Owners should, however, always consult their P & I Club before they decide to treat the charterparty as being repudiated and thus order the vessel to leave the loading port.

In the present case it follows from the information submitted that charterers have requested that the vessel remain at loading port and, hence, it appears that their intention is to supply the cargo. Accordingly, the circumstances would fall under A) as outlined above, i.e. at this stage the vessel will have to wait until the cargo is made available for shipment, although the situation may have to be reviewed at a later stage if no cargo is supplied which may bring the question of repudiation and damages into play.

Editor's note: Problems of the above nature were considered in a New York arbitration award (S.M.A. No. 2842) published in BIMCO Bulletin 5/92, page 57.

** See summary of the London arbitration award which appeared on pages 34/35 of BIMCO Bulletin 4/92 and in which it was held that the delay incurred due to problems with sale of the cargo should count against laytime.*

Weather exceptions - "weather working day", "weather permitting"

The most common weather exceptions to laytime are the "weather working day", "weather working day of 24 consecutive (or running) hours" and the "weather permitting" exceptions.

Whereas the main purpose of these exceptions is reasonably obvious, the application of these provisions may well depend on jurisdiction. For instance, there seems to be consensus among legal minds in England that there is now only marginal, if indeed any, difference between these expressions in that the "weather permitting" exception has the same implications as the "weather working day" or "weather working day of 24 consecutive hours" exception.*

Other jurisdictions view these matters differently. For example, the trend followed in Scandinavia and Germany seems to be that bad weather must de facto interrupt cargo operations irrespective of whether the exception reads "weather working day" (with or without reference to 24 consecutive or running hours) or "weather permitting".

When it comes to the "weather working day" exception there is another aspect which is that, if the contract is governed by e.g. English law it is not immaterial whether the expression reads "weather working day" or "weather working day of 24 consecutive (or running) hours".

The latter stipulation is pretty straight forward; whenever weather prevents (or would have prevented) cargo work then running of laytime may be suspended, i.e. laytime is suspended as and when the bad weather occurs be it during or outside working hours.

When the "weather working day" exception applies then one must apportion laytime in relation to the normal working hours of the port. (This means that bad weather occurring outside working hours does not affect counting of laytime).**

The different implications of the two expressions can be illustrated by definitions 16 and 17 of "Charterparty Laytime Definitions 1980" (sometimes referred to as the "Rio Definitions"):

16. "Weather working day" - means a working day or part of a working day during which it is or, if the vessel is still waiting for her turn, it would be possible to load/discharge the cargo without interference due to the weather. If such interference occurs (or would have occurred if work had been in progress), there shall be excluded from the laytime a period calculated by reference to the ratio which the duration of the interference bears to the time which would have or could have been worked but for the interference.

17. "Weather working day of 24 consecutive hours" - means a working day or part of a working day of 24 hours during which it is or, if the ship is still waiting for her turn, it would be possible to load/discharge the cargo without interference due to the weather. If such interference occurs (or would have occurred if work had been in progress) there shall be excluded from the laytime the period during which the weather interfered or would have interfered with the work.

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* *This seems to be the conclusion drawn in the wake of the* Vorras *(1983) 1 Lloyd's Rep. 579 judgement.*

** Reardon Smith Line Ltd. v. Ministry of Agriculture *(1963) 1 Lloyd's Rep. 12 (The Vancouver Strike Cases) House of Lords judgement.*

Occasionally charterparties are seen in which parties have agreed that laytime should be based on "weather working days of 24 hours", i.e. without specifying that it should be "consecutive" or "running" hours. Whereas we believe that it is generally recognized that such provision does not entitle charterers to e.g. three days of eight working hours before "24 hours" have elapsed still, to avoid becoming entangled in a dispute as to whether or not charterers are in fact entitled to compute laytime based solely on the working hours of the port thus resulting in artificially inflated laytime, it is recommended not to be indifferent to whether the provision reads "...days of 24 hours" or "...days of 24 consecutive (or running) hours"; the latter should invariably be opted for.

Although this may appear to be a statement of the obvious the reason why we mention this is that, we are given to understand, there has in fact been rendered a somewhat disturbing arbitration award in London in which it was held that in so far as laytime was based on "days of 24 hours" laytime allowed was tripled based on eight hours working days at the particular port, i.e. each "weather working day of 24 hours" would run for three days! Hence, to avoid this potential pitfall make sure that the salient provision refers to "consecutive" or "running" hours or, alternatively, just "weather working day".

■ Laytime at multiple discharge ports

Enquiry: The vessel was fixed to discharge at two ports. The charterparty prescribes that the daily discharging rate is 400 metric tons and that laytime is to be non-reversible. Parties now have a dispute with regard to computing laytime at discharging ports; charterers maintain that only one calculation covering both ports should be made whereas owners claim that the proper approach is to compute laytime at the two ports separately. Please advise which approach is the correct one.

Reply: We sense that owners base their view on the "non-reversible" stipulation. It must, however, be kept in mind that this stipulation does not relate to laytime computation at multiple discharge (or loading) ports: it refers to "non-reversibility" of laytime between loading and discharging, i.e. if parties have agreed to laytime being "non-reversible" then charterers are not allowed to offset unused laytime at loading against excess time used in discharge (or vice versa). Accordingly, if laytime is to be "non-reversible" between e.g. discharging ports then the charterparty must contain express provision to this effect.

This does not, however, *per se*, settle the matter because the general position is that laytime at multiple discharge (or loading) ports must be computed as if vessel had discharged at one port and, hence, if laytime at e.g. two (or more) discharge ports is to be computed separately the charterparty should contain clear and apt provisions to that effect.

Since the charterparty contains no reference prescribing that laytime at the two discharging ports is to be calculated separately, charterers' position, that one "total" computation is to be made, is the correct one. This is explained as follows in H. Holman's *A Handy Book for Shipowners and Masters*:

"If a ship is to load (or discharge) at two or more ports, the multiple operation is to be regarded as a single one for the purpose of calculating whether demurrage or despatch money was incurred. It is wrong, therefore, to apportion the time allowed for loading the whole cargo

between the respective quantities loaded at each port (*United British S.S. Co. v. Ministry of Food*, 1951)."

Put in another way, one may say that the sequence is that laytime commences to count at the first discharge (or loading) port in accordance with the laytime provisions contained in the charterparty; running of laytime is suspended during vessel's voyage to the second (and, if relevant, subsequent) port(s) and recommences to count on vessel's arrival at that port.

Laytime - weather working day

Enquiry: According to the terms of the charter party laytime for discharge has been agreed on the basis of "weather working days". Unfortunately, the agent has not recorded possible rain times in the statement of facts but merely made a note therein stating that "actual rain time will be according to the weather report of (the local) weather bureau".

Charterers have attached copy of weather report from the local meteorological observatory in support of their stance. They have further deducted alleged rain times as and when they occurred, be it within or outside normal working hours. The contract is governed by English law. Owners believe that charterers' approach is not correct and BIMCO is requested to submit comments on the points in dispute.

Reply: In English law there is a difference between the expressions "weather working day" and "weather working day of 24 consecutive hours"*. Had the latter of these two expressions been applicable, then charterers would be correct, i.e. under the "weather working day of 24 consecutive (or running) hours" they may suspend counting of laytime during periods of bad weather as and when it occurs, be it within or outside normal working hours.

However, under the "weather working day" stipulation, adverse weather outside normal working hours will not affect running of laytime. This is the conclusion which may be drawn from the *Reardon Smith Line, Ltd. v. Ministry of Agriculture, Fisheries and Food*, House of Lords judgement rendered i 1963 (the Vancouver Strike Cases, Lloyd's Rep. (1963)).

This means that one must apportion laytime if rain occurs during the normal working hours of a day. For example, if the working day consists of 16 hours from 08.00 hours to 24.00 hours (midnight) and bad weather occurs from 14.00 hours to 18.00 hours the day counts as twelve sixteenths that is three quarters of a day = 18 hours.

With regard to the question on the basis for computing laytime, BIMCO consistently holds the view that laytime computations should be based on the information contained in the statement of facts which should contain all relevant details concerning vessel's stay in port.

It should, therefore, be criticised when a port agent "short circuits" matters by inserting remarks such as the one quoted above because it runs contrary to the port agent's duty to protect the interests of the principal, i.e. the shipowner; partly because laytime computations should be based on the statement of facts which should contain all relevant details and partly because such a meteorological report is an alien document from an entity which may be situated far

* *See the article which appeared on page 17 of BIMCO Bulletin 6/92.*

away from the port and which contains no information as to whether the weather conditions may have interfered with cargo work. Consequently, weather conditions and whether or not they may have had an effect on cargo work should be meticulously listed in the statement of facts which should form the basis for the laytime calculations.

■ "Expected ready to load" versus laydays/cancelling

It is not immaterial which of the two expressions appear in the charter party. There are still some elderly charter party forms which in their printed text contain the "expected ready to load" provision. There may be a variety of reasons why this somewhat archaic expression is still to be found and we think that, nowadays when time is of the essence, this stipulation is fairly often deleted and replaced by, for instance, a stipulation that "laydays not to commence before...".

There are two very essential differences between the two statements and, hence, it would be wrong to incorporate both "expected ready to load" as well as "but not before", i.e. it should be either or.

One implication of "expected ready to load" is explained in the voyage chartering section of this book and it tends to surprise owners when the vessel is delayed. The statement implies that the shipowner has an absolute obligation to commence the approach voyage to the loading port in sufficient time for the vessel to get there on the date stated. If the ship is prevented from complying because of delays in her previous trading pattern the owner becomes liable, for instance, for demurrage of railways, cars or barges or storage expenses etc., regardless of whether the owners can be blamed for the delay. Only a clear case of delay by force majeure would exonerate owners.

One may ponder whether the stringent implications of "expected ready to load" as outlined above prompted the draftsmen of some of the charter party forms to soften the ramifications by adding the word "about" so that the provision reads "expected ready to load about..." (e.g. Box 9 and Clause 1 of GENCON) so as to import a margin. For example, if the vessel is "expected ready to load about the 18th" charterers must accept the ship (assuming she is in a contractual state), commence counting of laytime etc. if she arrives on the 17th or, perhaps, even the 16th (or the 19th or 20th) since the vessel was ready to load about the 18th. In *Dreyfus v. Lauro* (1938) the Court suggested that "expected ready to load about 15/18 November" meant not earlier than the 15th nor later than the 18th, with a possible two or three days' grace either way so as to give effect to the word "about".

When it comes to the expression "not before" this means exactly what the words say, i.e. the implication is that charterers would not need to count laytime before the date stated. Broadly speaking, there is for the present purposes not much difference between "not before../cancelling..." and "laydays/cancelling" in that under both the implication is, generally speaking that laytime could not commence to count before first layday. Whether one or the other of these two provisions applies, owners' obligations are less stringent. Although the vessel is expected to present herself within the agreed laydays, i.e. vessel's whereabouts should be realistically represented by owners still, the only remedy available to charterers should vessel miss the cancelling date is, unless there is misrepresentation on the part of owners, to cancel the charter with no further responsibility of either party.

Customary quick despatch

The Secretariat has recently been confronted with an increased number of enquiries pertaining to the implications of "Customary Quick Despatch" ("CQD"), "Custom of Port" ("COP") and similar expressions contained in voyage charter parties.

It should be kept in mind that "CQD" etc. implies undefined laytime. Generally speaking charterers' duty is "to do their best" in the prevailing circumstances at the material time. In the nature of things this will almost invariably lead to divergence of opinions as to when laytime allowed has expired and whether demurrage may be due.

Broadly speaking, it may be said that for the charterers to incur liability for delay(s), the owners must demonstrate that the delay is in fact within charterers' sphere of responsibility, i.e. owners must establish a direct link between the cause of delay and the charterers. In an English judgement from 1900 (*Watson v. Borner*) it was held that since the delay (in berthing) was caused by the consignee's failure to arrange a berth on vessel's arrival rather than any "fault" on the part of the charterer, the latter was not responsible for the ensuing delay which had to be absorbed by owners. One may envisage a multitude of situations in which there is delay(s) for which owners would be covered if fixed laytime is agreed, but which may have to be absorbed by them under "CQD" and similar terms. The Secretariat has been confronted with cases in which parties had further agreed that no demurrage or damages for detention would be payable in case of delays in loading or discharging. Such an agreement will, of course, further aggravate matters.

Consequently, what may initially appear to be an attractive rate of freight based on "CQD" terms may in fact turn out to be a financial disaster if the vessel is delayed for, perhaps, a considerable period of time for some reason(s) which cannot be brought within charterers' sphere of responsibility. As will be seen from the above, terms implying undefined laytime will, as a rule, be disadvantageous to owners and the better proposition is therefore to hold out for fixed laytime.

Arbitration clauses - time bar

Enquiry: In March 1992, vessel completed a comparatively uneventful voyage charter. About 16 months later, in July 1993, charterers claimed despatch money incurred at port of loading. This claim was refuted by owners who allege that, according to clause 37 of the governing charter, the despatch claim is time barred. Clause 37 reads, in part as follows:

Any claim must be made in writing and claimant's arbitrator to be appointed within 3 months after final discharge and where this provision is not complied with, the claim shall be extinguished and cease to exist. BIMCO was asked whether it was correct that charterers' claim was time barred.

Reply: BIMCO invariably warns against accepting arbitration clauses with such a short time-bar. It does not take much delay by one of the parties before a claim is time-barred. In addition to this, it is, strictly speaking, not enough that the claim has been submitted in writing, but an arbitrator must also have been appointed. In principle, one may say that provisions such as those quoted above essentially leave parties with no choice but to settle claims by way of arbitration rather than attempting first to settle claims amicably.

Another problem is that if the statement of facts, etc. are difficult to get hold of, and the charterparty contains the not uncommon provision that receipt of pertinent documentation, e.g. statement of facts, etc. is a prerequisite for settling the balance of freight, as well as demurrage/despatch, then the time-bar of three months may well be exceeded before the pertinent documentation is available and, hence, a claim for demurrage or, as in the present case, despatch may be time-barred.

In addition to this it is appropriate to mention that the party, who first appoints an arbitrator naturally refers to its claim only. In case the other party in appointing its arbitrator, omits to put in the counter-claim it might have, it will find that the arbitrators' jurisdiction covers only the claim of the first party with the result that the second party's counter-claim has become time-barred before it is aware of the situation.

The present case serves as an illustration that it is not only shipowners who should be on their guard with regard to accepting arbitration clauses with such a short time-bar. As may be gathered from the above, owners are correct in maintaining that since charterers have failed to submit their claim and, in principle, appoint an arbitrator within the contractually agreed time limit, their despatch claim is time-barred.

In this context, reference is made to a summary of a pertinent London arbitration award which appeared on pages 18-19 of BIMCO Bulletin 6/92.

In that case owners were to "present" their demurrage claim within 90 days failing which "Charterers shall be discharged and released from any liability in respect of any claims owners may have under this charterparty...".

The arbitrators were unable to conclude that owners had complied with the 90 days time limit and said, *inter alia*, that the particular clause contained in the charterparty:

"was clear and unambiguous, and placed an obligation on the owners to present their claim to the charterers within the time restraints imposed by the clause. That placed on the owners the responsibility of ensuring that their claim was properly presented to the charterers."

Since the arbitrators were unable to establish that owners had complied with that obligation their demurrage claim failed.

■ Laytime exception clauses

The use of exception clauses is, of course, nothing new. They come in different shapes and sizes, but the main purpose is the same; to suspend counting of laytime on the happening of certain events. This type of clause is therefore by nature tilted in charterers' favour. It appears however, that the use of exception clauses is becoming more and more common and the clauses seem to become more and more wide-ranging and, therefore, increasingly onerous, and although such clauses are difficult if not impossible to avoid, it seems that in many instances the adverse effects of such clauses come as a surprise.

In cases where the event is specified in the clause (for instance, strike), the application of the exception clause should cause no problems. However, it fairly often occurs that the particular

event is not specifically mentioned in the exception clause and, hence, parties tend to differ as to the applicability of the clause. Usually this type of clause contains one of two provisions reading either:

"or any other cause beyond the control of the Charterers"

or

"or any other cause whatsoever beyond the control of the Charterers"

both of which charterers usually tend to regard as "catch all" provisions sweeping up all sorts of events not expressly mentioned in the clause.

It is not, however, irrelevant whether the exception clause contains one or the other of the above provisions. The former of the above stipulations should, prima facie, be construed according to the ejusdem generis rule of construction, i.e. the actual event must be in the same category of events as those named in the clause, meaning that the scope of the exceptions clause should, generally speaking, be limited to events mentioned therein or events in the same category. The latter of the above stipulations implies by the use of the word "whatsoever", that this provision would probably have a "sweeping up" effect in the sense that the particular event need not be in the same category as those events expressly named in the clause.

There are, however, two other aspects which should be mentioned, viz. that the charterers must bring themselves within the exceptions clause by demonstrating that time in loading or discharging has actually been lost by an excepted cause and, since exceptions clauses of the nature discussed here are, as a rule, introduced in favour of the charterers, these clauses will be construed strictly against them in accordance with the contra proferentum rule of construction. This may, however, be of limited value if the exception clause is considered to be sufficiently wide in its scope, for instance, if the word "whatsoever" appears in the clause in the context as outlined above.

This being so, the obvious recommendation is to avoid exception clauses altogether which is, however, probably not possible in practice. The "second best" solution is, therefore, to attempt to restrict the applicability of such exception clauses, for example by ensuring that the word "whatsoever" and similar expressions which may be given equally wide scope do not appear in the clause and that the clause is in general worded in such a fashion that the ejusdem generis rule of construction will be applied.

It seems that frequently it is taken for granted that the exception clause in a charter party cannot be deleted or altered, particularly if it appears as part of the printed text of the particular charter party form, or the exception clause attracts little attention during chartering negotiations.

Although it may, perhaps, be considered unusual to propose amendments, etc., to exception clauses, particularly if they appear as part of the printed text of a particular charter party form, there is in principle no reason why one should not attempt to obtain the best possible (or rather the least arduous) result also on this point.

It should be kept in mind that leaving an extensive exception clause intact may have severe

financial consequences. Whenever charter party terms are proposed which include exception clauses they should, if they cannot be avoided altogether, be meticulously scrutinized and very carefully considered.

■ Prolonged stay in port

Enquiry: The vessel was fixed to load a cargo of coal. Laytime allowed was about five days. Loading did commence albeit slow and after about seventeen days the vessel was still waiting for the balance of cargo.

BIMCO's advice was sought as to whether, rather than claiming the agreed rate of demurrage there was basis for claiming damages for detention considering that the vessel was kept waiting for a considerable time in excess of the allowed laytime.

Reply: Most voyage charterparties contain demurrage provisions and when the contract contain such provisions then demurrage is, generally speaking, owners' sole remedy of compensation, both in terms of exceeding laytime allowed as well as increased port expenses.

This is so because, as opposed to unliquidated damages (damages for detention), demurrage is regarded as liquidated damages; it is owners' contractual compensatory remedy in case laytime is exceeded and there is no right to damages other than demurrage at the agreed rate when the only breach is failure to load (or discharge) within the agreed laytime.

Moreover, if there is no time limit on the period of demurrage, such as, for example, clause 7 of GENCON ("Ten running days on demurrage"), then owners have, in principle, agreed to an unlimited period of demurrage. It will therefore require adequate provisions in the governing charter so as to entitle owners to claim damages rather than demurrage. Hence the recommendation which can be found in Chapter 1 of this book:

"Keep in mind that the demurrage rate should be negotiated as shrewdly as the rate of freight. There are numerous examples of situations in which owners agreed to low demurrage in the hope of a fast turnround (especially when payment of "half despatch" is part of the deal), only to see a protracted stay in port, or even that the charterers use the low demurrage rate for manipulation with the sequence of turn of vessels."

■ Releasing B/Ls on completion

Enquiry: The vessel was fixed to load minimum/maximum 5,000 m/tons bagged sugar. Shippers appointed surveyor and owners employed tally clerks. The loaded quantity according to the surveyor was 5,000 m/tons, 100,000 bags whereas owners' tally revealed that only 99,894 bags had been loaded, i.e. a shortage of 106 bags.

After completion of loading the vessel was ordered to sail although the matter remained unresolved, and owners refused to release bills of lading. Lorry chits seemed to corroborate shippers' figures and there were no practicable possibilities to attempt to remedy the situation since the vessel had left the loading port.

BIMCO was requested to comment as to whether owners could rightfully refuse to release

bills of lading and whether there would be basis for a claim against owners for loss of time which may be incurred at port of discharge.

Reply: Initially we would say that it is not possible for the Secretariat to establish as a matter of fact whether owners' or charterers' figures are the correct ones. This said, the general position is that refusal to release bills of lading on completion of loading is not a remedy available to owners. According to Article 3(3) of the Hague Rules (similar requirement appears in Article 14 of the Hamburg Rules) "...the carrier shall, on demand of the shipper, issue to the shipper a bill of lading..." and, hence, it may be argued that reluctance to release the bills of lading is tantamount to an infringement of such rules.

The proper approach is that the vessel should remain at the loading port until the problems have been solved. Not only because charterers/shippers should be given the possibility to gain access to the cargo loaded and, in case of need arrange a fresh tally of the cargo, but certainly also because the delay at loading port may be much shorter than what may be expected at discharge port where the vessel could, in principle, wait indefinitely if the problem is not solved and if a practical solution for some reason cannot be achieved.

It is common ground that charterers/shippers cannot expect that Master/owners should expose themselves to shortage etc. claims by signing and releasing bills of lading containing details of the cargo which Master has reason to believe to be incorrect. Occasionally it happens that attempts are made to try to persuade owners/Master to sign "clean" bills of lading against a Letter of Indemnity although cargo is not "clean". Such a Letter of Indemnity is, however, unenforceable and is, therefore, not worth the paper it is written on if charterers for some reason should feel disinclined to adhere to it.

The governing charter apparently requires "clean" bills of lading to be issued and a bill of lading which is qualified as to the quantity stated therein would be considered to be "unclean". All the more reason for the vessel to have remained at loading port until the problems had been solved.

Such situation was considered in *inter alia* the *Boukadoura* judgement summarized on pages 16/17 of BIMCO Bulletin 1/89. Although this may have added to the problems, it should be kept in mind that there is an underlying principle pertaining to a contractual requirement for "clean" bills of lading which is that if charterers/shippers need "clean" bills of lading to be issued then they must see to it that the cargo supplied for shipment is indeed in such condition that there will be no need for superimposed remarks pertaining to the condition etc. of the cargo, i.e. the Master is not compelled to issue "clean" bills of lading irrespective of the circumstances.

Put in another way, Master's right and duty to endorse bills of lading if the condition etc. of the cargo so warrant, would remain unaffected by a contractual requirement for "clean" bills of lading and it is, therefore, within the realm of charterers' responsibility to supply cargo which warrants no remarks and which will enable Master to sign "clean" bills of lading accordingly.

It is difficult to suggest a solution which would once and for all solve the present problems. As mentioned above the vessel should have remained at loading port which, however, she did not and considering that the ship is only two days away from port of discharge ordering her to

return to port of loading is probably not a viable alternative. Had the vessel remained at loading port, the assumption is that time would have been lost sorting out the problems pertaining to the alleged shortage. If it is further assumed that there is merit in the Master's allegation pertaining to the shortage, then as it follows from the *Boukadoura* judgement the loss of time should prima facie be absorbed by the charterers.

As it is, it cannot, however, be excluded that, if more time is lost at port of discharge than what was likely to be lost had the vessel remained at loading port, then owners may have to defray some or all of the time lost if the charterers can demonstrate that the proximate cause of the excess delay stems from owners' decision to order the vessel to leave loading port before the problems pertaining to the cargo quantity to appear in the bills of lading were settled.

The "second best" alternative in terms of a practical solution trying to alleviate the present stalemate may be to attempt to discharge the cargo either against satisfactory guarantee in lieu of non-presentation of bills of lading or into custody pending further discussion pertaining to the bill of lading quantity and, subsequently, presentation of bills of lading at port of discharge. This should, however, not be done without the involvement of owners' P&I Club.

In connection with the discharge it may appeal to the parties to arrange a survey and although such survey cannot be considered conclusive still, it may serve as support for either owners' or charterers' position with regard to quantity of cargo loaded.

■ Receiving cargo - vessel to be ready to receive cargo to receiver's inspector's satisfaction

The Secretariat has recently been confronted with cases concerning the degree of vessel's readiness to load in light of the above and similar provisions. BIMCO consistently warns against accepting provisions involving third parties alien to the charterparty, e.g. provisions whereby demurrage at port of discharge is to be settled between receivers neither of which are parties to the charterparty (see page 12 of this book).

The above provision is in the same category. In the nature of things receiver's inspector is not particularly interested in which contractual provisions may regulate relations between owners and charterers, indeed receivers may be unaware of the charterparty terms altogether. The inspector has a vested interest in rigorously adhering to instructions from and defending the interests of the principal, the receivers.

The danger of accepting such provisions may be illustrated by a recent case which concerned a vessel fixed to load animal feed under a SYNACOMEX charter. In addition to the requirements contained in the printed text of lines 52/53 pertaining to vessel's readiness to load the contracted cargo, it was agreed that the vessel should also be "free of alive insects" which was spelled out in an additional clause which further provided *inter alia* that the vessel should

> "in every respect [be] suitable to receive the cargo at shipper's satisfaction and/or receiver's ..... inspector's satisfaction."

Needless to say that inspection was performed by receiver's inspector. No insects were found and, hence, the contractual requirement in this respect had been complied with. However, the

most zealous inspector demanded fumigation of vessel's holds "for precaution purposes", and without such "precautionary" fumigation the inspector would not approve the vessel.

As far as owners were concerned the vessel was in a contractual state without requiring fumigation, but in an effort to alleviate the situation owners ordered the "precautionary" fumigation notifying charterers that owners would not, however, defray this expense which ran into several thousand US Dollars.

Not surprisingly charterers took quite a different view and referring to the additional clause quoted above, they maintained that any fumigation would have to be arranged and paid by owners if that was what was required to obtain receiver's inspector's approval. At the time of writing the matter remains unsettled.

That charterparties contain provisions according to which the vessel is to be approved by surveyors is, of course, nothing new. These provisions comes in many shapes and sizes, frequently that the vessel is to be approved by e.g. government surveyors* or by **recognized** surveyor** which *prima facie* should ensure an objective evaluation of vessel's readiness. Other charterparty forms merely provide that notice is only to be given when the vessel is "in all respects ready"*** without specifying the status of the surveyor who will eventually inspect the ship.

In the majority of cases the surveyor is employed either by charterers or shippers and it is often an independent survey company which performs the survey, and so long as a reputable and professional company is employed chances are that owners will not be subjected to excessive and/or unreasonable demands pertaining to vessel's readiness.

An inspector employed by and serving solely the interest of the receivers and solely for the purpose of inspecting the vessel at the loading port in a foreign country need not be objective in terms of what may reasonably be required for the vessel to be considered "in all respects ready to load" and may, as illustrated by the above go even far beyond what may in the circumstances be considered reasonable, as a condition for approving the vessel. This, combined with a provision similar to the one quoted above will set the scene for a battle which owners will have to fight singlehandedly. In essence owners are in a "no win" position in case charterers adopt the view as outlined above.

The point is that if charterers are less than enthusiastic in terms of arranging such extra contractual fumigation or reimbursing owners the costs of same, then owners have two equally unattractive alternatives; to let the matter go, i.e. absorb the ensuing costs or to submit the matter to arbitration the outcome of which cannot be predicted, and the costs of which would undoubtedly exceed the amount at stake.

An alternative may be that owners themselves employ a surveyor when confronted with situations of this nature. Although this may have some effect still, it will not do away with the basic problem which is that it may be envisaged that receiver's inspector may still insist on certain measures to be done before passing the vessel, even if a surveyor employed by owners may consider the vessel "in all respects ready".

** Clause 18(e) of "Norgrain 89"*
*** Clause 10 of AUSTWHEAT 1990 *** Clause 8 of SYNACOMEX 2000*

The above comments should be kept in mind whenever provisions stipulating acceptance of vessel by receiver's inspector are proposed.

In-transit fumigation - delay and expenses at discharge port

Readers are referred to the article concerning the above which appeared on pages 29-30 of BIMCO Bulletin 5/93 and in which in-transit fumigation was discussed, including the safety aspects of this method of fumigation.

Another aspect, which deserves attention, is the possible consequence in terms of loss of time, additional port charges, etc., which may be incurred at **port of discharge** because of in-transit fumigation. The very purpose of fumigating the cargo whilst the vessel is en route to port of discharge is that the fumigant is to function during the voyage. Presumably this method of fumigating was invented in an attempt to save time, since vessel would not have to remain in port during the fumigating process. However, the toxic gases must, of course, be got rid of so as to gain access to the cargo at port of discharge.

Ordinarily, vessel's holds are sealed after completion of loading and remain so for a period of time during the voyage, and, on expiry of the prescribed fumigation time, holds should be ventilated so as to remove the toxic gases from the holds. Assuming that the voyage is sufficiently long and the weather is fine, there should be no great problems in this respect, but what if the voyage is not particularly long and/or inclement weather prevents ventilating holds, thus preventing the vessel from arriving at port of discharge with properly gas free holds?

Whereas the charterparty may contain provisions governing the question of costs and time used in fumigation at port of loading, parties may not be focusing on the problems which may arise at port of discharge. For example, if the weather and/or length of the voyage prevents ventilation of holds, the vessel may not be allowed to berth or, once berthed, she may be ordered to vacate the berth until she is gas free.

Depending on the circumstances, significant port charges may be incurred if, for instance, vessel has to vacate the berth, requiring pilot and/or tug(s), etc., not to mention the loss of time which may be further aggravated if the designated berth in the meantime becomes occupied by another vessel.

Whereas it would be only equitable and reasonable if charterers absorbed the extra charges, etc. as a matter of routine, it should still be kept in mind that, unless the governing charterparty contains adequate wording shifting the responsibility for such loss of time and/or additional port charges to charterers, they may successfully argue that these matters fall within owners' sphere of responsibility in view of the absence of specific provisions in the charterparty.

Hence, whenever in-transit fumigation is proposed, ensure that the question of possible loss of time and extra port charges, which may be incurred in this context at port of discharge, is also adequately covered in the charterparty.

Non-execution - brokerage

Enquiry: Have fixed a vessel for a cargo of steel from Black Sea port to one port Chile. Only a

few days after the business was fully fixed, charterers advised that they would not be able to perform. The governing charter party is the GENCON (1976 edition) in which clause 14 remain as printed with the word "deadfreight" added in line 142. The brokers claim to be entitled to one-third brokerage as prescribed in clause 14. Please advise if their claim is justified.

Reply: Please note that the stipulation in lines 144/147 has been included in the charter party in order to protect the interests of the chartering brokers who may have spent a lot of time, effort and money before a fixture is definitely concluded, and the stipulation applies **irrespective** of the reasons why the charter has not been executed.

The difficulty, however, is that in certain jurisdictions the broker is not party to the contract between owners and charterers and, hence, cannot directly proceed against the owners under the charter party (for instance, cannot instigate arbitration proceedings), but the broker may ask the charterers to commence such proceedings on the broker's behalf. In other jurisdictions the broker may proceed directly against the defaulting party*.

Quite another matter is that brokers who regularly do business with the particular party frequently relinquish from making use of the stipulation in clause 14 of the GENCON (1976 edition**) because they do not want unnecessarily to upset a good client, also in expectation of further business with the same client. Furthermore, the brokers may realize that the non-execution of the charter very often means a loss to the principal.

There are, therefore, several reasons why chartering agents, in certain circumstances, may be expected to adopt a lenient attitude dictated by commercial considerations in such matters, but as mentioned above, from a strictly contractual point of view the brokers would have a justified claim.

** See pages 20-23 of this book. However, this may have changed after the above reply was given*
*** The brokerage clause (now clause 15) in the 1994 edition of the GENCON has been revised. Readers are referred to pages 6-12 of BIMCO Bulletin 1/95.*

"Clean" Bills of Lading

It is well established that the Master is not compelled to sign "clean" bills of lading if the apparent order and condition of the cargo is such that appropriate remarks in the bill of lading in this respect would be warranted.

The Secretariat has been confronted with disputes concerning the signing of "clean" bills of lading even though the cargo loaded was defective. The charter parties contained provisions according to which "clean" bills of lading were to be issued/signed, and it would appear that charterers thought that they could circumvent the general position briefly outlined above, by including such provisions in the charter party.

In other words, since the charter party contained clear words to the effect that "clean" bills of lading were to be issued, charterers held the view that the Master had no choice but to sign such bills of lading regardless of the actual apparent order and condition of the cargo.

This is not, however, correct. The starting point is that, if charterers wish to have "clean" bills

of lading issued, they must see to it that the cargo is in such condition that the Master will not have to put remarks as to the apparent order and condition of the cargo in the bills of lading, i.e. charterers must arrange for delivery of cargo which is not defective.

Consequently, it may be said that a provision in the charter party which prescribes that "clean" bills of lading are to be issued is a provision which *prima facie* compels charterers to deliver "clean" cargo, and it **does not** preclude the Master from making appropriate remarks in the bills of lading should circumstances so warrant.

There may be charterers who, when confronted with owners prepared to stand their ground, may attempt to propose a letter of indemnity in lieu of signing "clean" bills of lading contrary to the factual condition of the cargo. BIMCO invariably warns against accepting such an indemnity. It is tantamount to fraud and the indemnity will be unenforceable and hence, not worth the paper it is written on.

It should be kept in mind that a possible delay in sailing - leaving aside the fact that such delay should be absorbed by the charterers - is to be preferred to the staggering claims which **owners** may have to face if they agree to issue "clean" bills of lading against such an unenforceable letter of indemnity. Wherever such situations arise, owners are well advised to consult their P&I Club.

■ No original B/L - no delivery of cargo

From time to time the BIMCO Secretariat has issued warnings and recommendations pertaining to delivery of cargo without production of original bill of lading*.

As may be expected the problem will not go away. To the contrary it seems that the cases in which attempts are made to induce owners to accept clauses whereby the cargo must be delivered without production of original bill of lading are on the increase.

It is we think apposite to outline the general position pertaining to delivery of cargo without production of original bill of lading. This is well illustrated by Lord Denning who in the *Sze Hai Tong Bank v. Rambler Cycle Co.* [1959] 2 Lloyd's Rep. at page 120 said, *inter alia*:

"It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril".

Consequently, the risk element if cargo is delivered without the original bill of lading will rest with owners. By analogy it may be concluded, therefore, that if there is no bill of lading there is no delivery of cargo; Master/owners are not compelled to deliver cargo until the proper and authentic bill of lading is presented.

Clauses like the following

"Should Bills of Lading not arrive at discharging port in time then Owners agree to release the entire cargo without presentation of the original Bills of Lading"

** See, e.g. Chapter 4 of this book*

are, unfortunately not uncommon. It must be kept in mind, however, that acceptance of clauses of this type may lead to financial catastrophe for the owners. There have been cases in which vessels were arrested for months because the cargo was delivered to the wrong party, and even subsequent sale of the ship by auction. This situation is brought about because owners cannot count on P&I cover in case of claims if they agree to clauses such as the one quoted above.

Hence, the words of Lord Denning may mean exactly what they say; owners may have to face the dire consequences **themselves** if things go badly wrong.

It is not infrequent that cargo interests propose a way out of the difficulties by suggesting that one original bill of lading is sent as "ship's mail" to be handed over to a named person. The problem with this approach is that the Master has no way of knowing whether that named person actually holds title to the cargo, which would not be the case if the cargo has been sold and re-sold during the voyage. In such case a duly endorsed original bill of lading is required and the one sent as "ship's mail" will not do.

Another method of attempting to overcome the difficulties is to issue a "Letter of Indemnity". Whilst this method is workable, it should be kept in mind that it should only be the wording as approved by the P&I Club which should be used, accepted. The point is that it is the owners' Club which will decide whether or not owners would be covered in the particular situation and as mentioned above the Club may feel disinclined to cover owners if they have accepted a dubious "letter" the contents of which the issuer may be unable or unwilling to comply with. Consequently, there are two options available to the cargo interests:

1. To produce the original bill of lading, or

2. To provide a **satisfactory** guarantee in lieu of delivering cargo without production of the original bill of lading. This should mean, in practice, that the P&I Club is consulted either to approve a proposed wording, or to suggest a suitable wording of such guarantee, letter or indemnity.

The Secretariat has been confronted with cases in which attempts had been made to coerce Master/owners to deliver cargo although neither bill of lading nor satisfactory guarantee was presented on the pretext that the ensuing loss of time until discharge commenced should be absorbed by owners. Considering that Master/owners are not compelled to deliver cargo unless and until either of the above-mentioned two alternatives have been complied with, owners cannot be saddled with the ensuing loss of time.

For example, in S.M.A. Award No. 1759 the panel unanimously concluded that owners' refusal to discharge the vessel until a bill of lading or suitable form of guarantee was presented, was correct and proper.

The charterers did propose a form of guarantee which was not, however, found acceptable. The owners required a guarantee in the form generally accepted by their P&I Club.

The panel found no fault in owners' conduct. The vessel was fully available to the charterers and was, in fact, awaiting the presentation of bills of lading or a suitable bank guarantee and, hence, the ensuing loss of time should be defrayed by the charterers.

Laytime exceptions - wind

Enquiry: The vessel was discharging at the port of Novorossiysk. According to the statement of facts there had been periods during which discharge was temporarily stopped because of wind. The port agent stated that the shift was ordered off and that laytime should not count. Please advise if there is a general rule according to which a certain wind force will result in cessation of work and whether laytime should be suspended.

Reply: Initially we would say that we do not offhand see that it is the task of the port agent to establish whether or not laytime may count according to the terms contained in the governing charter party.

This said, wind is, like rain, snow, etc., a state of weather which may entitle charterers to suspend counting of laytime if the governing charter party contains relevant provisions to that effect, e.g. "weather working day of 24 consecutive hours" or "weather permitting". The difficulty with wind is, however, that there is no objective yardstick by which to measure which wind force may entitle charterers to invoke a "weather" exception.

There are, however, ports at which there may be a helpful yardstick which could be applied, viz. safety regulations laying down, *inter alia*, that when the wind exceeds a certain force cargo work is suspended as a matter of safety. This is actually the case at Novorossiysk. Information contained in BIMCO's records indicates that cargo operations may cease temporarily, *inter alia*, when the wind force is 15 m/sec (or more).

As far as BIMCO is concerned, safety regulations appear to be a reasonable yardstick with which to measure when charterers may be entitled to invoke a "weather" exception. For example, if cargo operations are temporarily discontinued because port authorities and/or port regulations conclude that the particular wind force makes it dangerous to perform cargo work, then it would be a reasonable proposition to hold that charterers should be entitled to invoke a "weather" exception as may be contained in the particular charter party.

Time bar clauses

Many readers have probably at some stage been confronted with the so-called time bar clauses which come in many shapes and sizes. These time bar clauses are actually curious animals in that they are designed to exonerate charterers from payment of an otherwise quite justified and legitimate claim from owners (typically demurrage) if owners for one reason or another are unable to comply with the provisions contained in the particular clause.

For example, the governing charterparty contains a clause prescribing that demurrage is to be paid upon owners' presentation of the invoice together with all supporting documents duly signed by the respective parties.

Another clause in the charterparty is a time bar clause according to which **any** claim must be presented within e.g. 90 days from completion of discharge failing which the claim will be considered time barred.

There are many ports in the world where owners may find it difficult to obtain the required documentation in time to enable owners to comply with the "within 90 days" time bar.

It should be kept in mind that the trend followed by arbitrators is to construe these time bar clauses quite literally. This may be illustrated by a London arbitration award rendered in 1992. The time bar clause (clause 5) read as follows:

"Charterers shall be discharged and released from any liability in respect of any claims owners may have under this charterparty (such as, but not limited to, claims for demurrage, deadfreight, shifting or port expenses) unless the claim has been presented to charterers in writing, with supporting documents, within 90 days from completion of discharge of cargo carried under the above charterparty."

Demurrage was incurred and owners submitted their claim. Apparently there was a delay in the chain of brokers and charterers claimed they only received owners' claim well after the 90 days time bar had elapsed. The tribunal held, *inter alia*, that:

"...clause 5 of the charterparty was clear and unambiguous, and placed an obligation on the owners to present their claim to the charterers within the time restraints imposed by the clause."

Owners were unable to demonstrate that the charterers or their brokers had received the demurrage claim before expiry of the 90 days period elapsed and owners' claim was, therefore, time barred.

A similar decision was reached by a majority in S.M.A. Award No. 2258. Also in that case owners were unable to prove that they mailed their claim together with supporting documents in time, just as they were unable to demonstrate with a preponderance of credible evidence that charterers or their agents should have received the claim.

Recently, the Secretariat was confronted with yet another version of this type of clause which, unfortunately, although it may perhaps not be entirely unintentional, appear to obscure rather than clarify matters. The clause reads as follows:

"Charterers shall be discharged and released from all liability in respect of any claim/invoice Owners may have/send to Charterers under this Charter Party unless a claim/invoice has been received by Charterers in writing with supporting documents within 75 (seventy-five) days from completion of discharge of the cargo concerned under this Charter Party. Full notification with copy of documents to be received by Charterers within 60 days."

"Any claim/invoice which owners may have under this Charter Party shall be deemed waived and absolutely barred, if claim/invoice as above specified is not received by Charterers within the agreed time bar."

"Demurrage, if any, shall be payable by the Charterers against Owners' invoice supported by Notices and Statements of Facts from loading and discharging port duly signed by shippers/receivers respectively."

One may ponder as to the necessity for a notification within 60 days. Would an otherwise justified claim become extinct if owners for one reason or another failed to notify charterers within 60 days? What if the vessel performs multiple consecutive voyages under the same charter - when would the 75 days then start?

It may, perhaps even with some merit, be argued that the reason why these time bar clauses initially found their way into charter parties (notably in the tanker trade) was to attempt to bring about a comparatively early finalising of accounts pertaining to the particular voyage. It would appear, however, that the purpose of these time bar clauses has changed as illustrated by the short time bar contained in clauses such as the one quoted above; the shorter the time bar the better chances for charterers to avoid payment of, for instance, a demurrage claim. Hence BIMCO's comments at the beginning of this article in addition to which it may be apposite to quote the following which can be found on page 11 of this book:

"Keep in mind that agreement to payment of demurrage on owners' presentation of invoice with all supporting documents within, e.g. 30 days from completion of discharge often lands you in trouble. There are many examples of owners finding their demurrage claim time-barred under such clauses because of the impossibility of obtaining the Statement of Facts, etc. within the stipulated time."

Even if owners would manage to obtain the required documents they may not have been signed by parties as may be identified in the time bar clause thus affording charterers an opportunity to refute the claim which could subsequently become time barred once owners manage to obtain the required signatures.

As may be seen from the above, this type of clause should be approached with great caution and if commercial reality dictates acceptance of such a clause, special attention should be given to the time limit as well as which documents may be required.

■ Statements of facts versus "Weather Reports", etc.

Readers may recall previous articles in various BIMCO publications pertaining to the above. In view of an increased number of disputes being submitted to the Secretariat it is thought to be useful to submit a few comments on the subject matter.

It is well established shipping practice that time sheets should be computed on the basis of the particulars denoted in the statement of facts. Nonetheless, it is all too frequent that BIMCO is confronted with disputes in which a party to a dispute may use the *absence* of its signature in an attempt to argue that the statement of facts is incorrect and/or inadequate etc. and use that as a pretext to submit various foreign documents to support a view which cannot be supported by the information contained in the statement of facts.

The fact that a party to the contract may present reports from the Harbour Master or a meteorological station to contest or disprove entries in the statement of facts is, of course, nothing new. In the material contained in the Secretariat there is *inter alia* reference to an English judgement from 1908 in which charterers - unsuccessfully - sought to rely on a declaration from the port captain that certain days were "surf days".

As far as disputes submitted to the Secretariat are concerned, the majority of disputes in the present context arise in connection with absence from the statement of facts of information pertaining to weather conditions during a period when the vessel may have been waiting for berth; the port agent may for one reason or another have omitted to denote in the statement of facts how the weather behaved in port during the waiting period. If the charterers subse-

quently receive information to the effect that there were allegedly periods of bad weather which may have entitled them to invoke a weather exception as contained in the governing charter party, they will attempt to adduce evidence to support their stance. Similarly, if owners suspect that the statement of facts is artificially inflated with periods of bad weather, they may seek to trace evidence to disprove the contents of the statement of facts.

The variety of alien documents which a party may seek to rely on has, however, proliferated somewhat in that now, in addition to the documents mentioned above, a party to the contract may attempt to introduce statements from the local Chamber of Commerce (mainly in India) which in some ports have taken it upon themselves to declare certain days "(non)weather working days" or even "half weather working days" *regardless* of whether or not work may have been carried out on the particular vessel at the material time.

Foreign documents such as the ones mentioned above are perfect dispute breeders because neither of them contain information as to whether or not the particular vessel may have been working at the material time. So far as meteorological reports are concerned the reason for this is quite simple; such reports are not designed for that purpose.

Another problem is that the meteorological station may be situated elsewhere in the region and may record weather conditions in a very general manner all of which, through no fault of the meteorological office will obscure rather than clarify matters, when used to support a view in a laytime dispute. We have seen cases in which the port agent made no other remarks pertaining to the weather than a statement to the effect that "the weather conditions are to be as observed by the meteorological office". Clearly, such a "shortcut" should be criticised.

Having said this, it does appear that the courts and arbitration tribunals are not, generally speaking, taking such foreign documents at face value. This may be illustrated by the decision of the tribunal in a French arbitration award summarised in BIMCO Bulletin 1-1975, in which the charterers sought to rely on a report from a meteorological station. The arbitrators found as a matter of fact that the meteorological installations were situated at a distance of eight km. from the port. **Held**, that the report should be disregarded.

In a recent New York Arbitration award (No. 3236) charterers submitted a statement from the State Hydrometeorological Committee. Unsurprisingly, there was no mention in that statement as to where the rain fell or whether it would have interrupted the loading operations had such operations been contemplated. In those circumstances the panel could not accept that the charterers had lifted their burden of proof by producing the raintime statement and, hence, charterers did not succeed.

Similarly, the view in English law appears to be that such alien documents should not be taken at face value. At best these statements may be regarded as documents from which it may or may not be concluded that the weather may have been bad enough to prevent working of the ship. Another point is that, if parties could introduce all sorts of foreign documents, this would in effect render the statement of facts an entirely useless piece of paper.

Readers will be aware of the "Standard Statement of Facts" issued/recommended by BIMCO. Specimens of this document can be found in "Forms of Approved Documents". This document contains *inter alia* boxes for signatures by the parties concerned; the Master, port agent

and the shippers or receivers. Signing this document is not an idle exercise; it serves a purpose which is to ensure that the parties may express reservations to information contained therein prior to signing the document. Also, port agents should be instructed, as standard procedure, to make sure that weather conditions also during a period when the vessel may have to wait for a berth to become free, should be denoted in the statement of facts. Even if at the end of the day the contents of the statement of facts is "unfavourable" still, the expenses in this context are in all probability dwarfed by the costs involved in conducting arbitration proceedings.

■ "Ocean" bill of lading

From time to time the Secretariat is requested to supply a specimen of an "ocean" bill of lading. It appears that the query originates from the letter of credit or contract of sale/purchase of a commodity which may refer to the issuance of an "ocean bill of lading". For example, article 23 of ICC's "UCP 500" defines "Marine/Ocean Bill of Lading". Hence, the charterers request owners to issue such an "ocean" bill of lading. As far as BIMCO is concerned, an "ocean" bill of lading is any bill of lading which is designed and used for seaborne transport, e.g. the CONGENBILL, CONLINEBILL, etc., etc.

Apart from the problem that there is, as far as we know, no bill of lading form titled "Ocean" bill of lading, the above definition contained in "UCP 500" actually appears to define a "liner" bill of lading, partly because the definition may support this view and partly because there is another article (article 25) of "UCP 500" which defines "Charter party Bill of Lading". Consequently, if parties in a sale/purchase of commodity agreement or letter of credit merely refer to an "ocean" bill of lading having to be issued and one of the parties subsequently proceeds to charter a vessel under a charter party and the proper charter party bill of lading is issued accordingly, parties may unwittingly have landed themselves in a lot of trouble if the buyer's bank refuses to release funds because the bill of lading does not correspond with the type of bill of lading as defined in article 23 of the "UCP 500" rules.

An additional difficulty may be that the people in the banks checking cargo documents in a particular transaction may be reluctant to approve bills of lading which appear not to be "ocean" bills of lading because the word "ocean" appears nowhere in the particular bill of lading. In theory this is not, of course, the shipowners' problem. In practice, however, it frequently turns out to be just that; when being faced with a situation in which no money is forthcoming under the sales agreement, cargo interests will exert quite a lot of pressure upon shipowners to issue a fresh set of bills of lading. The preferred approach is to request owners to issue "liner" bills of lading.

The point is that it is probably a less unattractive alternative to attempt to persuade the ship owners to comply with cargo interests' requirements than it is, for instance, to amend the terms of the letter of credit.

It is realised that there may be commercial considerations which may dictate that shipowners comply with charterers' request. It should be kept in mind, however, that issuing "liner" bills of lading under a voyage charter will in all probability result in trouble. This is so because the documents are essentially designed to be used in different circumstances and, hence, the terms of the documents are incompatible. This means that, by issuing a "liner" bill of lading under a voyage charter party, owners have signed two documents each containing its own terms per-

taining to the provisions covering the transport aspect, i.e. owners may have, for instance, a "free out" charter party as well as a "liner out" contract (the "liner") bill of lading.

As far as owners are concerned, they may be under the impression that it is the "F.I.O." charter party which will govern matters at port of discharge. This is, however, by no means an absolute. The first problem which may be envisaged is that charterers and consignees cannot agree which of the two should defray stevedoring expenses. This may result in idle time for the ship, and even if laytime and/or demurrage, as the case may be, may be running still, it is not a very attractive situation for owners if the vessel is seriously delayed; owners may have felt compelled to agree to an in-adequate rate of demurrage on top of which the vessel may miss the cancelling for the next employment.

In addition to delay to their ship, owners may also be faced with a situation in which charterers have agreed with consignees to arrange and pay stevedoring at discharge but have failed to do so. The consignee having purchased a "liner" bill of lading may demand delivery of the cargo, and since it is not the consignee who is to pay, etc., for stevedoring, the ensuing expenses must be defrayed by owners who will then have to attempt to seek reimbursement from charterers. Consequently, the better alternative is that owners do not adhere to charterers' request to issue "liner" bills of lading under a voyage charter party.

Should owners, however, decide that the particular circumstances would dictate that they at least consider charterers' proposal, the matter should be approached, as illustrated above, with the utmost caution, and owners would be well advised to consult their P&I Club before issuing "liner" bills of lading under a voyage charter party.

■ Turn time - notice time

From time to time the Secretariat is confronted with enquiries which suggest that turn time is analogous to notice time. There may, of course, be situations in which parties have, unwittingly perhaps, agreed to turn time provisions which will have largely the same effect as notice time, but it should be kept in mind that turn time basically serves a different purpose than notice time.

Notice time and turn time do, however, have one thing in common: both signify that the vessel is waiting in owners' time. The general purpose of turn time is that it is designed to operate if there is congestion, the ships having to wait in turn, i.e. the sequence in which vessels are allocated berth. Initially, the turn period was, in essence unlimited, charterparties merely containing provisions to the effect that the vessel may have to wait in turn. It was therefore a matter of luck (or the opposite) exactly how long the vessel would have to wait in owners' time. Over the years this has, however, developed into a more rigid formula whereby in most instances the turn time for owners' account is subject to an upper limit thus enabling owners to calculate from the outset the maximum waiting period for their account. It should be kept in mind, therefore, that if the charterparty contains no maximum time limit for the turn time, owners have in principle agreed to unlimited turn time.

It is fairly frequent that problems arise because parties agree to terms which do not properly take into account that turn time and notice time are alternatives, i.e. that there is either turn time viz., congestion, or the vessel is able to proceed straight to berth. If the charterparty does

not clearly specify the alternative, charterers may well wish to invoke the turn provision because it may provide them with a longer period of "free time", regardless of whether it is one or the other situation.

The Secretariat has also been confronted with situations in which charterers wanted the best of two worlds, i.e. turn time as well as notice time, but as indicated above this would not be the case. If there is waiting time, the charterers are, of course, entitled to invoke a turn time provision which will run until expiry (if it is limited in time) or until the vessel ceases to wait in turn whichever is the earlier. Conversely, if the vessel proceeds straight to berth in the ordinary sequence of berthing procedures at the port, the turn time provisions will not take effect and it will be a straight forward situation governed by the provisions pertaining to notice and notice time respite.

One may envisage a situation in which the vessel is kept waiting in turn exceeding the maximum turn time allowed by the charterparty. In such a situation, laytime would commence to count on expiry of the turn time, i.e. the notice time respite would not come into play since charterers have already had the benefit of the "free time" imported by the turn time (not infrequently of longer duration than notice time) and it would be unjust and improper if they should gain the "double benefit" of being entitled also to the notice time respite.

■ Despatch on "all time saved"

Enquiry: As per the terms of the charter party despatch is to be computed on the basis of "all time saved". Laytime allowed is ten days. Despatch has been calculated to be eleven days. Owners argue that charterers cannot calculate despatch exceeding laytime allowed, i.e. ten days, whereas charterers are of the opinion that their calculation is correct. BIMCO's opinion was sought as to which party might be right.

Reply: The case briefly outlined by you seems to be an apt illustration of the relevance of our warnings against accepting provisions allowing charterers to calculate despatch on "all time saved". For instance, on page 12 of this book the following can be found:

"As for despatch money: from cases submitted to the BIMCO Secretariat it appears that it comes as a surprise to many that agreement on payment of despatch money on 'all time saved' can result in a situation in which the number of days on which despatch has to be paid exceeds the number of days agreed as laytime allowed."

As may be gathered from the above, the despatch payable to charterers may exceed laytime allowed. This is so because days which may be excepted from the running of laytime, for instance Sundays and holidays, must be included in the despatch computation being part of "all time saved".

For example, if the charter party is based on SHEX laytime, a Sunday would not count against laytime. It would, however, count as one day "saved" in the despatch calculation which is, of course, much more disadvantageous to owners than despatch on "all working time saved" if payment of despatch has been agreed. The difference between the two types of despatch calculation may be illustrated by definitions 26 & 27 of VOYLAYRULES 93 (which can be found in, *inter alia*, "Forms of Approved Documents"):

26. "DESPATCH ON (ALL) WORKING TIME SAVED" (WTS) or "ON (ALL) LAYTIME SAVED" shall mean that despatch money shall be payable for the time from the completion of loading or discharging to the expiry of the laytime excluding any periods excepted from the laytime. (Emphasis added)

27. "DESPATCH ON ALL TIME SAVED" (ATS) shall mean that despatch money shall be payable for the time from the completion of loading or discharging to the expiry of the laytime including periods excepted from the laytime. (Emphasis added)

■ Waiting for charterers' inspector

It is not infrequent that charter parties contain provisions according to which it is prerequisite for submitting valid notice of readiness that vessel's holds have been inspected and passed by an inspector employed by charterers or even receivers (see Note 1). However, the purpose of the present comments concerns another aspect, *viz.* waiting for charterers' inspector once the vessel has arrived.

In English law the charterers have no inspection duty immediately upon vessel's arrival. The view is that cargo interests should be able to rely on the notice of readiness basically stating a fact; that the ship is ready so far as charterers can then use the vessel when so notified. It may, therefore, be a bit of a gamble to give notice from the waiting place if no inspection is performed there which may be the rule rather than the exception.

When the vessel is eventually inspected alongside, the waiting time will be for owners' account if the inspector rejects the vessel's holds. The point is that it will be inferred that the ship was not ready when the notice was given. The notice would, therefore, be a nullity, of no effect and a fresh notice should be given once the ship is in a contractual state as laid down in the *Tres Flores* judgement (see Note 2). Conversely, if the holds are passed by the inspector, the initial notice must be presumed to have been a good notice and the ensuing waiting time must be absorbed by the charterers. As may be gathered there is the potential for adverse effects as far as owners are concerned if an inspector feels that he owes complete loyalty towards his employer to the extent of clouding his vision.

This having been said, the harsh effects of the *Tres Flores* judgement in English law may to some extent be "cushioned" if the charter party contains provisions (a) entitling the Master to tender notice of readiness from the waiting place in case of, for instance, congestion and (b) governing a situation in which the vessel is turned down on inspect-ion once she comes alongside. This was the outcome in the decisions rendered in the *Jay Ganesh* (see Note 3) and the *Linardos* (see Note 4) judgements. In the former of these judgements, the charter party in question was the "Worldfood" charter party which in clauses 8 and 9(5) contains precisely the aforesaid provisions. Colman J. said, *inter alia* that:

"The overall effect of cll. 8 and 9 was that this form of charter required that the charterers must pay for waiting time at the anchorage when they had not provided a berth, but that if the vessel then caused delay after arrival in berth because she was not in truth then ready to load or discharge that loss of time was to be borne by the owners."

It should be mentioned, however, that reliance on the above requires that the Master acts in

good faith when he submits the notice of readiness, i.e. if the Master genuinely believes that the ship is in all respects ready to load or discharge he may tender a notice of readiness. This means on the other hand that charterers will have the possibility to attempt to demonstrate that the notice should be considered invalid if circumstances are such that the Master may appear not to have acted in good faith. If charterers manage to lift their burden of proof, the principles laid down in the *Tres Flores* would apply.

The view which appears to be favoured by New York arbitrators may be illustrated by the decision in S.M.A. award No. 1180 in which the panel unanimously held, *inter alia*:

"that the time waiting for the charterers' surveyor to inspect the vessel's tanks was used laytime. To consider otherwise would be contrary to the intent of the Charter Party and would give Charterers a licence to pass on their delays to Owners."

A similar view was expressed by the panel in S.M.A. award No. 3417 in which it was held, *inter alia* that:

"The Panel further believes that [Charterer] had the option....either to inspect a vessel at anchorage or (for whatever reason) to wait until it arrived at the loading berth. However, the contract language and structure favor an early test of a vessel's readiness as the most economically efficient procedure. Under the scheme of the COA, and the ... Charter, after arrival of the vessel, the charterer has a reasonable time in which to test its readiness before laytime begins to run.

If it does so and the vessel fails, the owner gets an early opportunity to clean the tanks, and the charterer is relieved of paying demurrage until the vessel is ready. If, however, the charterer, for its own reasons, chooses not to make such an early readiness test, it may do so, but at the cost of paying demurrage up to the time of the tests. ... While an owner cannot rely upon this structure if it knew that its NOR was improper,..... there has been no such showing in this case."

It appears, therefore, that so far as New York arbitrators are concerned there seems to be a trend among New York arbitrators to consider that the time waiting for charterers' inspector to inspect the vessel must be defrayed by the charterers if for one reason or another they defer inspection of the ship rather than arranging the inspection upon the vessel's arrival.

It is submitted that the intention with the salient provisions in the "Worldfood" charter party and other charter parties containing similar provisions reflect a balanced and equitable approach to the question of vessel's waiting for berth period. The point is that, so long as the vessel is idle because of having to wait for a berth to become vacant charterers are no worse off than they would be if the vessel would have been approved immediately upon arrival. It could even be argued that, in case the vessel has to wait for a considerable period, charterers would gain a windfall if the vessel is subsequently refused by the inspector (which would probably not be unlikely if the vessel has been waiting at anchorage for a long time).

This would appear to be the reasoning behind the decisions reached by the panels in the New York arbitration awards referred to above, and it is gratifying to note that the court in the *Jay Ganesh* construed the clauses to apply in the manner intended. Readers should be guided accordingly.

Notes

(1) *See the "Voyage chartering" section of this publication and the "Worth knowing!" article titled "Receiving cargo" in BIMCO Bulletin 5/94 or in the "chartering/operation" section in the membership area of our internet website.*

(2) *The* Tres Flores *[1973] 2 Lloyd's Rep. 247 (C.A.)*

(3) *Lloyd's Rep. [1994] 2 358.*

(4) *Summarised in BIMCO Bulletin 2/94.*

(5) *Pertinent parts of clauses 8 and 9 of the "Worldfood" Charter Party read in part as follows:**

"8.(c) If a loading/discharging berth is not available or if such designated berth is not available upon the Vessel's arrival at or off the port, notice of readiness may be given upon arrival at the customary waiting place...

9.(e) If after berthing the Vessel is found not to be ready in all respects to load/discharge, the actual time lost until the Vessel is in fact ready... shall not count as laytime...".

** Clause 9(e) of the WORLDFOOD 99 has been amended.*

■ Safe port - safe berth

The BIMCO Secretariat is fairly often confronted with enquiries from members pertaining to safety of a port or a berth. The most common concern relates to prevailing weather conditions, be it upon vessel's arrival or when the ship is at the berth.

Generally speaking, a port is not unsafe *per se* because the vessel cannot enter the port immediately upon arrival. It is a not uncommon phenomenon that weather conditions may temporarily hamper vessel's berthing. This is tantamount to temporary hindrance falling within the shipowners' sphere of risk and responsibility in the context of the navigation of the ship. So as to shift responsibility for the ensuing waiting time where vessel's berthing is delayed solely by adverse weather conditions upon the charterers, the charter party must contain apt provisions to that effect.

Many of the cases, however, concern a situation in which the vessel was actually at the berth and they may be divided into two categories:

1) The vessel remained at the berth and damage was inflicted on the ship and/or equipment,

2) The Master decided to shift the vessel temporarily to anchorage thus incurring shifting expenses and possibly loss of time.

Broadly speaking, it may be said that the Master is in the unenviable position that it is almost certain that whatever he chooses, his decision is bound to cause grievance, either with owners if he chooses 1) or with charterers if he chooses 2) above.

This having been said, the safety of the port will depend on whether there are the required navigational aids, tugboats as may be required, pilots etc. which will enable the vessel to reach the port, remain in it and return from it without being exposed to danger except for abnormal occurrences*.

Another aspect is that Master's actions or lack of same must be considered, i.e. whether he has displayed ordinary skilful seaman-ship, *viz.* handled the situation in the same manner as any other prudent and skilful Master would have done. For instance, in situation 1) above it may be that there was no possibility for the ship to shift because of lack of pilot or tugboat(s). This would probably be deemed to render the berth or port unsafe.

Conversely, if Master decides to remain at the berth even though the required navigational aids are available, the berth would be likely to be considered a safe berth. The point is that if the possibility is there but the Master for reasons of his own decides not to utilise it, it is Master's decision rather than the conditions at the port or berth which causes the damage.

Consequently, if the weather conditions dictate temporary vacation of the berth/port and the navigational aids as may be required to perform the shift are available at the material time, and the shift can be performed safely/in safety but Master decides not to shift the vessel resulting in damage to the ship, it is unlikely that owners would succeed in arguing that the port and/or berth were unsafe at the material time.

A related problem in these matters is that port authorities as a rule do not take kindly to ships destroying the quays etc.

Many port authorities are in fact so dissatisfied that they will submit a claim which is disproportionate to the damage caused and detain the vessel until payment has been made or a P&I guarantee has been provided.

This is perhaps the more important aspect here because such claims are known to be prone to dwarf what other damage may have been caused to the ship as well as the loss of time incurred.

As may be gathered from the above, there is no list of given answers which may hold good regardless of the circumstances, but even though these cases to a large degree depends on the actual situation still, we think readers may be guided by the above comments.

* *The* Eastern City *[1958] 2 Lloyd's Rep. 127.*

■ "Austwheat 1990" - waiting for berth - readiness

The following is an example of the enquiries submitted to the Secretariat:

Enquiry: The vessel was fixed on the "Austwheat 1990" charter to load wheat. The ship arrived at Adelaide 29 September and had to anchor waiting for berth. Notice of readiness was tendered and vessel waited until 8 October.

Upon berthing the quarantine surveyor turned the vessel down because insects were found in one hold. Fumigation was ordered and the vessel was passed by surveyor 9 October. Charter-

ers argue that, since the vessel failed inspection, the waiting time from 29 September until 10 October should be defrayed by the owners. Owners, however, argue that such a situation is governed by clause 11(b), lines 89/90*, i.e. owners should absorb only the time used to additional clean the vessel hold(s).

Reply: Initially we would mention that according to clause 33(a), Australian law governs disputes arising within Australian territory and we have to say that we have been unable to trace a decided case (arbitration award or judgement) in which a situation similar to the present one was considered in light of Australian law.

This said, the present case does, however, have similar features to the *Jay Ganesh* [1994] 2 Lloyd's Rep. 358. The Court was fairly clear on the question of the application of the salient provision by saying that if the contract contains such a stipulation it must be given a meaning; it cannot simply be ignored. This does not mean that the *Tres Flores* principle (that the vessel must be "ready", in a contractual state when the notice is given) no longer applies, but it does add what one may call equity to that principle.

There is a good faith presumption, i.e. Master must be presumed to act in good faith as to vessel's readiness when the notice is tendered. Hence, the charterers still have the possibility to attempt to demonstrate that Master cannot have been acting in good faith when the notice was tendered. If the charterers manage to lift their burden of proof, the *Tres Flores* principle would apply: the notice would be deemed to be invalid.

Logically, the good faith obligation must therefore be presumed to have been complied with if the charterers are unable to lift their burden of proof. In such case the provision in clause 11(b) takes effect, i.e. the time lost waiting for berth must be absorbed by the charterers and only the time needed to make the ship fully ready will be for the owners' account.

By way of **general** comments we would say that the allocation of risk achieved by the salient provision is equitable. This is so because the waiting time incurred would have been for the charterers' account **in any event** had the vessel not been turned down and it may be said, therefore, that charterers are no worse off than they would be had the vessel actually been approved by the surveyor upon berthing.

Outcome: The Secretariat was pleased to receive the following from the member: "Many thanks indeed for your prompt reply on the above subject. It was quite useful and handy. In fact, charterers based on the information provided by you have finally agreed as per our version and will be remitting demurrage accordingly."

* "*If after berthing the vessel is found not to be ready in all respects to load, the actual time between the time of this discovery to the time that she is in fact ready to load shall not count as laytime.*"

GENCON 76 - strike clause

Enquiry: "We had a vessel fixed for carrying a bulk cargo basis GENCON 76 from one loading port to two discharging ports, the first port being in Spain with a standard 'General Strike Clause'.

Having loaded the cargo, the vessel continued to the first discharging port. However, after discharging, the vessel was prevented from departing due to strike. Fishing boats, protesting against the increased fuel prices, had blocked the port entrance.

Is this case covered under the 'General Strike Clause'? May we, as ship owners, request that the charterers pay half the demurrage, covering the excess time spent at the port? Is there any other way of reducing owners' losses in this respect?"

Reply: "We are afraid that we are unable to support owners forcefully. The blockade by the fishing boats has nothing to do with the strike clause contained in the contract. It is a wholly extraneous event outside the realm of the contract.

At the end of the day the particular situation will probably be deemed to fall within the aspect 'perils of navigation', which falls squarely within owners' sphere of risk and responsibility.

This being so, we are afraid that owners will have no course of action against the charterers in this case. We regret being unable to submit more encouraging comments."

Despite BIMCO being unable to support its member with a favourable reply, the owner submitted the following response. However, BIMCO's objective was achieved by preventing its member from pursuing what was probably a lost cause:

"I thank you very much for your prompt and exact reply. Really, the various situations are not always on Owners' side. However, your responses always clarify matters".

"Performance clause"

Enquiry: The Secretariat was recently confronted with the following "performance clause":

In case the vessel has to stop during the voyage between loading and discharging port, at an intermediate port or place because of technical problems (such as engine damage etc.) such stay not to exceed fourteen days. Otherwise the owners have to perform the voyage by another vessel within eighteen days after the first day of stay at such intermediate port.

Our member wished to know what the implications of this clause would be and also if such clauses are applicable nowadays.

Reply: Initially we would say that, to our knowledge, such clauses are not applicable nowadays.

It is well known that weather problems in voyage chartering in terms of increased voyage time and bunker consumption will rest with the owners of the vessel. These are natural consequences of operating ships on the high seas. It is equally well known that delays in this context, for instance delayed delivery of the cargo at port of discharge, will rest with the charterers. This is the common division of risks.

Looking at the above clause it seems that owners are to warrant arrival of the ship at discharge within a certain "window" with a slight amount of leeway, i.e. the charterers appear to want

the shipowners to warrant a certain performance time, which is pretty much in the same category as provisions whereby owners undertake that the vessel will arrive at discharging port no later than a certain date.

The clause goes further than that, however, in that it compels the owners to find alternative tonnage if the vessel originally fixed suffers a major breakdown in the course of performing the laden voyage. It could be seen as an attempt to circumvent a situation which may occur, for instance, in case of General Average. That need not, of course, bring an end to the contract per se, but if repairs are required in this context which will take more than 14 days, owners will have to find another ship to complete the voyage.

Although it is not clear from the text of the clause, it is assumed that arranging for the alternative tonnage will be for owners' account. Hence, in addition to the problems connected with the damage etc., owners will also have to find another ship to complete the voyage, and one may wonder whether the freight paid will be sufficient to cover that eventuality.

Another problem is that if there really is no other suitable tonnage able to take the cargo in case of need, owners are in breach of contract. Allowing for the fact that there is suitable tonnage available, but only at exorbitant rates of freight, owners are essentially compelled to fix such tonnage so as not to be in breach of contract.

It is not, of course, difficult to understand that the charterers wish to have their cargo at the destination within a reasonable time frame which is realistic in the circumstances. However, with clauses such as the one quoted above, owners must realise that unless they are able to obtain a quite extraordinary rate of freight, what initially may appear as an attractive freight rate may turn out to be a financial disaster. In a "worst case scenario" owners will have to arrange and pay for repairs to their vessel, on top of which they will have to find and fix other tonnage at their expense to complete the voyage if repairs to their ship exceed two weeks duration.

Needless to say, the Secretariat would advise against the acceptance of such provisions.

Define your terms!

That disputes occur in shipping ought to come as no surprise to anyone. It is probably inherent in any contract that it is likely to contain terms which are unclear and thus beckons dispute. Hence, contractual disputes are a fact of life. Even so, BIMCO invariably recommends that parties make an effort to making themselves as clear as possible in the course of chartering negotiations where abbreviations - some of which may be obscure even to those who invented them - feature prominently. However, there are commonly used and thus well known terms, the interpretation of which tends to be disputed time and again.

This was one of the reasons why a group of national and international organisations, including BIMCO, drafted "CHARTERPARTY LAYTIME DEFINITIONS 1980", sometimes also referred to as "the Rio Definitions" (the group met in Rio de Janeiro). The aim was to identify a number of words, terms and concepts frequently used in voyage chartering.

In the event, the group identified thirty-one such words, terms and concepts, which it set out

to define. The intention was that those definitions should be voluntarily incorporated into charter parties "to diminish confusion and to widen the international understanding of chartering terms in the hope that such Definitions might help to limit and, thereby, also help to reduce legal costs" (from the announcement by the sponsoring organisations).

Unfortunately, for reasons not readily apparent, the shipping industry did not seem to be particularly keen on adopting the definitions and they thus led a somewhat obscure life until the early 1990's when it was decided, nonetheless, to revise them. The commendable aim as outlined above of course still being in the focus of the working group.

This resulted in "VOYAGE CHARTERPARTY LAYTIME INTERPRETATION RULES 1993", code name VOYLAYRULES 93". As will be seen, application of these rules require that they be expressly incorporated into the governing contract. However, although the purpose of the definitions is to assist users in defining particular terms etc., which may otherwise be potential dispute-breeders, it is of course open to the parties to apply some of the definitions only. This can be done, for instance, by incorporating a clause in the governing contract in which the particular term is defined as set out in VOYLAYRULES 93.

BIMCO strongly believes in the use of clear and unequivocal terms. One may possibly disagree with one or other of the definitions, but the fact remains that once there is a clear definition in the contract of a particular term, potential conflict - at least so far as that term is concerned - ought to be eradicated. Readers are therefore recommended to use them!

The VOYLAYRULES follow in full below:

VOYAGE CHARTER PARTY LAYTIME INTERPRETATION RULES 1993 issued jointly by BIMCO, CMI, FONASBA and INTERCARGO.

Code Name: VOYLAYRULES 93

PREAMBLE
The interpretations of words and phrases used in a charter party, as set out below, and the corresponding initials if customarily used, shall apply when expressly incorporated in the charter party, wholly or partly, save only to the extent that they are inconsistent with any express provision of it.

When the word "charter party" is used, it shall be understood to extend to any form of contract of carriage or affreightment including contracts evidenced by bills of lading.

LIST OF RULES

1. "PORT"
2. "BERTH"
3. "REACHABLE ON HER ARRIVAL" or "ALWAYS ACCESSIBLE"
4. "LAYTIME"
5. "PER HATCH PER DAY"
6. "PER WORKING HATCH PER DAY" (WHD) or "PER WORKABLE HATCH PER DAY (WHD)

7. "DAY"
8. "CLEAR DAYS"
9. "HOLIDAY"
10. "WORKING DAY" (WD)
11. "RUNNING DAYS" or "CONSECUTIVE DAYS"
12. "WEATHER WORKING DAY" (WWD) or "WEATHER WORKING DAY OF 24 HOURS" or "WEATHER WORKING DAY OF 24 CONSECUTIVE HOURS"
13. "WEATHER PERMITTING" (WP)
14. "EXCEPTED" or"EXCLUDED"
15. "UNLESS SOONER COMMENCED"
16. "UNLESS USED" (UU)
17. "TO AVERAGE LAYTIME"
18. "REVERSIBLE LAYTIME"
19. "NOTICE OF READINESS" (NOR)
20. "IN WRITING"
21. "TIME LOST WAITING FOR BERTH TO COUNT AS LOADING OR DISCHARGING TIME" or "AS LAYTIME"
22. "WHETHER IN BERTH OR NOT" (WIBON) or "BERTH OR NO BERTH"
23. "VESSEL BEING IN FREE PRATIQUE" and/or "HAVING BEEN ENTERED AT THE CUSTOM HOUSE"
24. "DEMURRAGE"
25. "DESPATCH MONEY" or "DESPATCH"
26. "DESPATCH ON (ALL) WORKING TIME SAVED" (WTS) or "ON (ALL) LAYTIME SAVED"
27. "DESPATCH ON ALL TIME SAVED" (ATS)
28. "STRIKE"

RULES

1. "PORT" shall mean an area, within which vessels load or discharge cargo whether at berths, anchorages, buoys, or the like, and shall also include the usual places where vessels wait for their turn or are ordered or obliged to wait for their turn no matter the distance from that area. If the word "PORT" is not used, but the port is (or is to be) identified by its name, this definition shall still apply.

2. "BERTH" shall mean the specific place within a port where the vessel is to load or discharge. If the word "BERTH" is not used, but the specific place is (or is to be) identified by its name, this definition shall still apply.

3. "REACHABLE ON HER ARRIVAL" or "ALWAYS ACCESSIBLE" shall mean that the charterer undertakes that an available loading or discharging berth be provided to the vessel on her arrival at the port which she can reach safely without delay in the absence of an abnormal occurrence.

4. "LAYTIME" shall mean the period of time agreed between the parties during which the owner will make and keep the vessel available for loading or discharging without payment additional to the freight.

5. "PER HATCH PER DAY" shall mean that the laytime is to be calculated by dividing (A),

the quantity of cargo, by (B), the result of multiplying the agreed daily rate per hatch by the number of the vessel's hatches.

Thus:

$$\text{Laytime} = \frac{\text{Quantity of cargo}}{\text{Daily rate X Number of Hatches}} = \text{Days}$$

Each pair of parallel twin hatches shall count as one hatch. Nevertheless, a hatch that iscapable of being worked by two gangs simultaneously shall be counted as two hatches.

6. "PER WORKING HATCH PER DAY" (WHD) or "PER WORKABLE HATCH PER DAY" (WHD) shall mean that the laytime is to be calculated by dividing (A), the quantity of cargo in the hold with the largest quantity, by (B), the result of multiplying the agreed daily rate per working or workable hatch by the number of hatches serving that hold.

Thus:

$$\text{Laytime} = \frac{\text{Largest Quantity in one Hold}}{\text{Daily Rate per Hatch X Number of Hatches serving that Hold.}} = \text{Days}$$

Each pair of parallel twin hatches shall count as one hatch. Nevertheless, a hatch that is capable of being worked by two gangs simultaneously shall be counted as two hatches.

7. "DAY" shall mean a period of twenty-four consecutive hours running from 0000 hours to 2400 hours. Any part of a day shall be counted pro rata.

8. "CLEAR DAYS" shall mean consecutive days commencing at 0000 hours on the day following that on which a notice is given and ending at 2400 hours on the last of the number of days stipulated.

9. "HOLIDAY" shall mean a day other than the normal weekly day(s) of rest, or part thereof, when by local law or practice the relevant work during what would otherwise be ordinary working hours is not normally carried out.

10 "WORKING DAYS" (WD) shall mean days not expressly excluded from laytime.

11. "RUNNING DAYS" or "CONSECUTIVE DAYS" shall mean days which follow one immediately after the other.

12. "WEATHER WORKING DAY" (WWD) or "WEATHER WORKING DAY OF 24 HOURS" or "WEATHER WORKING DAY OF 24 CONSECUTIVE HOURS" shall mean a working day of 24 consecutive hours except for any time when weather prevents the loading or discharging of the vessel or would have prevented it, had work been in progress.

13. "WEATHER PERMITTING" (WP) shall mean that any time when weather prevents the loading or discharging of the vessel shall not count as laytime.

14. “EXCEPTED” or “EXCLUDED” shall mean that the days specified do not count as laytime even if loading or discharging is carried out on them.

15. “UNLESS SOONER COMMENCED” shall mean that if laytime has not commenced but loading or discharging is carried out, time used shall count against laytime.

16. “UNLESS USED” (UU) shall mean that if laytime has commenced but loading or discharging is carried out during periods excepted from it, such time shall count.

17. “TO AVERAGE LAYTIME” shall mean that separate calculations are to be made for loading and discharging and that any time saved in one operation is to be set off against any excess time used in the other.

18. “REVERSIBLE LAYTIME” shall mean an option given to the charterer to add together the time allowed for loading and discharging. Where the option is exercised the effect is the same as a total time being specified to cover both operations.

19. “NOTICE OF READINESS” (NOR) shall mean the notice to charterer, shipper, receiver or other person as required by the charter party that the vessel has arrived at the port or berth, as the case may be, and is ready to load or discharge.

20. “IN WRITING” shall mean any visibly expressed form of reproducing words; the medium of transmission shall include electronic communications such as radio communications and telecommunications.

21. “TIME LOST WAITING FOR BERTH TO COUNT AS LOADING OR DISCHARGING TIME” or “AS LAYTIME” shall mean that if no loading or discharging berth is available and the vessel is unable to tender notice of readiness at the waiting-place then any time lost to the vessel shall count as if laytime were running, or as time on demurrage if laytime has expired. Such time shall cease to count once the berth becomes available. When the vessel reaches a place where she is able to tender notice of readiness laytime or time on demurrage shall resume after such tender and, in respect of laytime, on expiry of any notice time provided in the charter party.

22. “WHETHER IN BERTH OR NOT” (WIBON) or “BERTH OR NO BERTH” shall mean that if no loading or discharging berth is available on her arrival the vessel, on reaching any usual waiting-place at or off the port, shall be entitled to tender notice of readiness from it and laytime shall commence in accordance with the charter party. Laytime or time on demurrage shall cease to count once the berth becomes available and shall resume when the vessel is ready to load or discharge at the berth.

23. “VESSEL BEING IN FREE PRATIQUE” and/or “HAVING BEEN ENTERED AT THE CUSTOM HOUSE” shall mean that the completion of these formalities shall not be a condition precedent to tendering notice of readiness, but any time lost by reason of delay in the vessel’s completion of either of these formalities shall not count as laytime or time on demurrage.

24. “DEMURRAGE” shall mean an agreed amount payable to the owner in respect of delay

to the vessel beyond the laytime, for which the owner is not responsible. Demurrage shall not be subject to laytime exceptions.

25. “DESPATCH MONEY” or “DESPATCH” shall mean an agreed amount payable by the owner if the vessel completes loading or discharging before the laytime has expired.

26. “DESPATCH ON (ALL) WORKING TIME SAVED” (WTS) or “ON (ALL) LAYTIME SAVED” shall mean that despatch money shall be payable for the time from the completion of loading or discharging to the expiry of the laytime excluding any periods excepted from the laytime.

27. “DESPATCH ON ALL TIME SAVED” (ATS) shall mean that despatch money shall be payable for the time from the completion of loading or discharging to the expiry of the laytime including periods excepted from the laytime.

28. “STRIKE” shall mean a concerted industrial action by workmen causing a complete stoppage of their work which directly interferes with the working of the vessel. Refusal to work overtime, go-slow or working to rule and comparable actions not causing a complete stoppage shall not be considered a strike. A strike shall be understood to exclude its consequences when it has ended, such as congestion in the port or effects upon the means of transportation bringing or taking the cargo to or from the port.

Time charters

(see also About "about" on page 76)

"Off-Hire" - consequential delay - NYPE

Enquiry: "Vessel is at present trading under a NYPE Charter. During this voyage vessel encountered some delays, one due to winch breakdown and one due to engine breakdown. The combined result is that vessel not likely to meet tide in Calcutta due to draft and may be delayed entering Calcutta port for some days. Charterers have notified owners holding vessel off-hire in Calcutta due to delays which owners protest. Owners not disputing off-hire for breakdown but disputing off-hire claim for failing to reach port at the right time after vessel again fully operational. Arbitration London. We shall appreciate your comments."

Reply: "Mailing you reference to British judgement (*Eastern Mediterranean Maritime v Unimarine* - Lloyd's Rep. (1981) 2 p. 622) interpreting Clause 15 and supporting the view that vessel is on hire when she is in contractual state and that owners cannot be saddled with 'consequential delay'."

The above judgement concerned a case in which the vessel proceeded to Bahrain and would have berthed at 09.20 hours on 18 July, but at 09.09 hours on 17 July she grounded. She re-floated at 16.09 hours on 27 July and was thereafter waiting for a berth until 16.25 hours 6 August, 1976.

Charterers maintained that no hire was due for the period from 27 July to 6 August. Owners disputed this, and in the resulting arbitration proceedings the arbitrator found that once the vessel re-floated she was at time charterers' disposal and the loss of time thereafter was not the grounding but the Bahrain port system of allocating berthing turns to ships which arrived after the grounding of the time charterers' vessel. In the subsequent judgement (Q.B. Commercial Court) it was held that:

"It was clear that Clause 15 was intended to deal with periods during which the full working of the vessel was prevented and no other."

NYPE C/P - Master deciding to transit Magellan Strait instead of rounding Cape Horn

Enquiry: On evaluation of weather forecast the Master decided that it would be safer to transit Magellan Strait and took pilot at Laitec. Time charterers disputed liability for pilotage expenses. Owners enquired with the Services Division whether time charterers' standpoint was justified.

Reply: In matters of navigation it is the Master and no-one else who must use his judgement and decide on, for instance, routes to be taken according to circumstances. The Master holds a very responsible position, he is charged with the safety of crew, vessel and cargo, and his position demands the exercise of all reasonable care and skill in navigation. In support of the above, references were made to, *inter alia*, a London arbitration award concerning a case in which the Master decided on taking the longer Southerly route from the West Coast of U.S.A. across the Pacific Ocean to Mainland China. Time charterers claimed for the return of seven days hire.

Arbitrators decided in favour of the owners by ruling that it can be a matter of luck which route turns out to be better as far as weather is concerned in the month of January. In the opinion of the arbitrators, the Master acted reasonably in the circumstances, albeit that, with hindsight, the Northerly Route would have permitted a quicker passage of time than that achieved on the Southerly Route. This could not be reasonably anticipated by the Master when he made his decision to take the Southerly Route and, consequently, no blame attached to the Master for making this decision, the test being what was reasonable bearing in mind the surrounding circumstances at the time.

In another London arbitration award reported on pages 7972-7973 of BIMCO Bulletin 2/85 it was held by arbitrators that the Master was primarily responsible for the safety of his ship and cargo. He was the paramount authority for decisions made on the spot. He was the person who could best assess the risks and dangers to which the vessel was exposed. His decisions could not be challenged during an emergency or later with hindsight by outsiders ensconced in comfortable offices on shore.

The BIMCO Services Division expressed the opinion that the cost incidental to passage of Magellan Strait should be paid by the time charterers as a matter of routine.

Is Venice East or West of Cape Passero?

Enquiry: A vessel was fixed on time charter stipulating redelivery "Hamburg/Gibraltar range, Mediterranean not East of Cape Passero in charterers' option." Last port of call prior to redelivery was Venice where charterers wanted to redeliver the vessel contending that Venice is not East of Cape Passero. Owners objected. Different rates of hire had been agreed upon for the above redelivery ranges. BIMCO's comments were requested by the member.

Reply: "In the context of time chartering and of a redelivery clause like the one in your case, we are of the consistent opinion that Venice is East of Passero and hence, charterers are not contractually allowed to redeliver the vessel at this port. It should be kept in mind that there is a commercial background to the agreement reached between the parties. The background is not sheer geography detached from realities of shipping practice. In our view, the effect of the agreement is that vessel could be redelivered in an area between Gibraltar and the longitudinal line Cape Passero/Libyan coast and that the remaining part of the Mediterranean is East of Cape Passero. Venice is in this remaining part."

Outcome: The Secretariat was pleased to receive the following advice from the member: "Please note that especially due to your telex the charterers finally agreed to redelivery at Cape Passero as per C/P terms."

NYPE - no loss of time, no off-hire

Enquiry: Time-chartered vessel is fixed to load a cargo of coal. On sailing from loading berth vessel came into contact with stationary barge at 23.34 hours. Master informed port authorities of the accident and vessel sailed from berth the following day. The accident and delayed departure from berth occurred in a period in which the vessel anyhow had to wait until port authorities allowed "daylight navigation" through the Hainan Strait. Our member enquired whether in these circumstances the vessel could be considered "off hire".

Reply: In our opinion the key element in the "off hire" is loss of time in rendering the time charter service required at the material time in which one of the events enumerated in the clause occurred. If the "accident" or "breakdown" did not result in loss of time, there is no "off hire" situation. This position is supported by a London arbitration award from which we would quote the following excerpts:

"Boiler leak was discovered at 20.30 on March 4. Discharge was completed at 13.10 on March 5 and the vessel could have sailed at 14.30 if there had been no boiler defect. Boiler repairs were completed at 09.30 on March 6 but vessel did not sail until 15.25 because of having to wait for tide.

Held, the discharge of the vessel was not hindered or prevented by the leaky boiler and, therefore, by the application of the off-hire clause, the vessel could not be off-hire until 13.10 on March 5 (completion of discharge) at the very earliest. Further, from 13.10 on March 5, until 14.30 the same day, the leaky boiler was having no effect on the service to be performed by the vessel for the simple reason that she could not sail until 14.30 because of tidal conditions. It follows that, by the application of the words, 'time lost thereby during which the vessel is unable to perform the service immediately required', the off-hire period could not commence until 14.30 on March 5 this being the time that the vessel would have sailed if there had been no boiler defect."

Time charter - obnoxious "breaching I.W.L." clause

Enquiry: Negotiating vessel for a time charter trip to the Great Lakes. Charterers want owners' acceptance of the following clause:

"Charterers to pay additional insurance premium on hull and machinery actually paid by owners for breaching I.W.L. Such additional premium not to exceed that for minimum coverage under the London underwriters minimum scale on conditions no wider than their standard form of institute time clauses. Owners confirm that hull and machinery policies contain waiver of subrogation rights against charterers for loss of or damage to vessel however caused notwithstanding any term, condition or exception of the charter owners to waive all claims against charterers for damage arising or resulting from navigating outside I.W.L. and/or to ports which are reasonably accessible. Master to exercise due diligence to avoid loss of or damage to ship and cargo."

Our member requested BIMCO's advice/recommendations to the above clause proposed by time charterers.

Reply: Concentrating on second part of the clause we would strongly recommend not to accept this clause, and at any rate not before:

a) owners check whether the policy contains such waiver as referred to in the clause

b) discussing the whole matter with your hull risk underwriters because of the very wide implications ("...damage to the vessel however caused") of the clause proposed by the charterers.

We have seen a lot of bad terms but this is the first time we see such a clause which exposes

the owners so much and quite ironically for giving the time charterers the privilege of breaking I.W.L. Quite frankly the effect of this clause can be so costly that owners should think twice whether the proposed business is worth taking the risk. Even the first paragraph of the clause is somewhat contradictory because on the one hand charterers are to refund the extra premium actually paid by owners but this is qualified that this extra premium is "...not to exceed that for minimum coverage under the London...".

Another point is that under first para of this clause (and certainly not under the second part) no one would indemnify owners for loss of time during repairs of damage sustained when trading outside I.W.L. A related clause approved by BIMCO can be found in the Clauses section of the Forms of Approved Documents binder (Seaway & Great Lakes Trading Clause).

Outcome: The Secretariat was pleased to receive the following advice from the member: "Pleased to advise that charterers finally agreed to delete second paragraph of the clause up to '.... reasonably accessible'."

■ Compulsory gangway watchmen - NYPE C/P

Enquiry: The vessel is trading mainly to West African ports where it appears that gangway watchmen are compulsory. There is no provision in the charter party specifically covering this point. BIMCO's member required advice as to whether the charges incidental to compulsory watchmen should be absorbed by the owners or the time charterers.

Reply: Charges incidental to compulsory gangway watchmen must be absorbed by the time charterers. In this context, the following article which appeared in the BIMCO Annual Report 1974-1975 was quoted:

"**Charges for Gangway Watchmen**
BIMCO has been asked for an opinion in respect of the responsibility for expenses for gangway watchmen under a time charter.

It was explained by BIMCO that it is believed to be generally recognized that under a time charter the cost of watchmen is normally apportioned in such a manner that the owners pay the cost of gangway watchmen if watchmen from shore have been ordered by the Master for instance, because he does not want to employ members of the crew to perform the work as they may be needed for other jobs on board, whereas the cost of cargo watchmen is for account of the time charterers. However, at some ports the employment of watchmen from shore is compulsory and in such circumstances the time charterers will be liable for the costs of both categories of watchmen, the item being considered to belong to the ordinary port expenses for which the time charterers are responsible because they have ordered the vessel to a port where such expenses are invariably incurred. Consequently, where watchmen have to be employed from shore because it is compulsory, the costs should be for account of the time charterers.

This matter is also duly covered, for instance, in Clause 4 of the 'Linertime' Deep Sea Time Charter which provides, *inter alia*, that

> '..... The gangway watchman to be provided by the Owners but where compulsory to employ gangway watchmen from shore, the expenses to be for the Charterers' account'."

NYPE C/P - delivery/redelivery local times or GMT

Enquiry: The vessel was delivered Brazil and redelivered Portugal. Owners calculated delivery local time Brazil and redelivery local time Portugal. Charterers insist both delivery/redelivery time to be local time Portugal. BIMCO's advice was requested by our member as to whether owners' or charterers' approach was correct.

Reply: It would appear that charterers wish to apply the concept of "actual elapsed time" whereas owners wish to apply local times. Basically the answer to which method should be applied depends on which law governs the contract. Under English law the "sand in the glass" method would apply, i.e. actual elapsed time which, in practice means conversion to GMT. In this context we would refer to summary of the *Arctic Skou* judgement which appeared on pages 8194/8195 of BIMCO Bulletin 5/85:

"The vessel was delivered to the defendants at a port in Brazil at 16.00 on 12 August 1982 local time and was redelivered to the owners at Bilbao at 13.03 on 9 September 1982 by local time. The result was that the time for which the vessel had remained on hire measured by the difference between the local times prevailing at the points of delivery and redelivery was 27 days 21 hours and 3 minutes. However, since the local time in Brazil was five hours behind the local time at Bilbao the consequence was that the actual time for which the vessel remained on hire ('the elapsed time') was five hours less than the difference between the local times, i e. 27 days 16 hours and 3 minutes. The charterers paid hire for the vessel for the shorter period. The owners said that they were entitled to hire for the longer period....

... Held, that the period calculated by the charterers was the correct one, and judgement would be given accordingly."

American arbitrators seem to take the opposite view in that the majority of American arbitration awards favour application of local times at delivery and redelivery when the charter party is silent on this point; a general remark made by the arbitrators being that had charterers wished for application of GMT then they should have specifically covered this point in he charter party.

Time charter - hire "per calendar month"

The Secretariat has recently received an increased number of enquiries concerning the correct approach when calculating hire which is payable "per calendar month". Because of the varying number of days in a month, the calculation of hire on the basis of "calendar month" will often show inconsistent results. Disputes most frequently occur when it comes to calculating the hire for fractions of a month, for instance, in the event that vessel goes off hire.

It should be kept in mind that the "calendar month" for the purpose of time charter hire commences from the time vessel is delivered on a certain date in a month and ends at the same time on the same date in the following month and so on regarding the following "calendar months". For example, hire for one "calendar month" may commence 15 January. The "calendar month" thus ends 15 February, i.e. 31 days, whereas the hire for the next "calendar month" from 15 February to 15 March covers a period of 28 days.

If vessel goes off hire, say, from 2 to 14 February, although February has 28 days, the off hire period falls within a 31 days "calendar month", i.e. the period from 15 January to 15 February.

Similarly, an off hire period from 2 to 14 March would fall within a 28 days "calendar month". The divisor when computing the daily off hire for the period from 2 to 14 February would, therefore, be 31 days whereas in the second case mentioned, the divisor would be 28 days.

The procedure in calculating hire for a fraction of a "calendar month" may also be explained as follows:

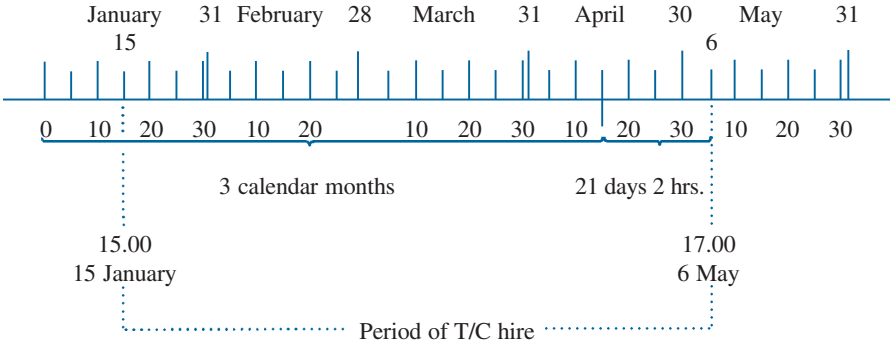
Divide the monthly hire by the number of days in the month which expires during the period where fractional payment applies: multiply the result with the number of days for which payment is due. The situation can be exemplified thus:

Charter period: about 4 months
Hire: GBP 15,000.00 per calendar month
Vessel delivered: 15 January at 15.00 hours
Vessel redelivered: 6 May at 17.00 hours

Hire payable

15.1., 15.00 hours -15.2., 15.00 hours:	=	GBP 15,000.00
15.2., 15.00 hours -15.3., 15.00 hours:	=	GBP 15,000.00
14.3., 15.00 hours -15.4., 15.00 hours:	=	GBP 15,000.00
15.4., 15.00 hours - 6.5., 17.00 hours		
GBP 15,000 x 21 days 2 hours / 30 days	=	GBP 10,541.66
		GBP 55,541.66

Using this example the method may be illustrated by the following diagram:



■ Time charter - whether off-hire periods may be added to period of hire

Enquiry: The vessel was fixed for three months' time charter with several options which were all utilised in full. During the performance of the time charter there have been some off-hire periods (engine repairs, drydocking etc.) ranging from a few days to several weeks.

Please advise whether time charterers are entitled to add the off-hire periods to the period of time charter or if vessel must be redelivered on expiry of the contractual period, irrespective of the off-hire events which occurred during the performance. For your guidance the charter party does not contain a specific clause regulating this question.

Reply: From your enquiry it follows that the governing charter party is silent on the question of adding off-hire periods(s) to the period of hire. In such case the time charter period is not prolonged by off-hire period(s). In this context we quote the following article which appeared in a previous BIMCO Annual Report:

"**Period of hire not prolonged by 'off-hire' periods**
In a few cases it has been argued that in calculating the total period of hire under a time charter, charterers are allowed to add off-hire periods to the term of hire. This is not so. In practice, it is well-established that the period of hire extends from the time when the vessel is delivered and placed at the disposal of the charterers and runs continuously until the charterers redeliver the vessel to her owners except for periods when the vessel may be off-hire. However it has been established in law that the period of hire is not prolonged by the time a vessel spends off-hire unless the charter party expressly so provides."

Time charter trip "about ... days without guarantee"

It is not infrequent that the Secretariat is confronted with cases in which parties have fixed a vessel for a timecharter trip with a duration of a certain number of days (e.g. 45/50 days) which is further qualified by the words "about" and "without guarantee".

This is why the Secretariat recommends in this book to "be more specific when stipulating the earliest/latest redelivery dates for the vessel".

This is so because whenever there is a timecharter **trip** then basically owners must expect that the vessel is redelivered on termination of the trip. If the charterparty contains reference to the duration of the trip it may depend on the words used so as to determine (in case of need in arbitration) which inaccuracy as compared with actual period of employment would make time charterers liable, i.e. each case must be considered on its own merits.

BIMCO holds the view that words like "about", "without guarantee" are not tantamount to carte blanche entitling time charterers to keep the vessel in their service for an undefined period beyond the term stated or of redelivering the vessel when only e.g. half of the estimated period has elapsed. In our opinion such words imply no more than that at the time of fixing charterers had every reason to conclude that the trip would last the period states, but owners must expect that the trip may take **reasonably** less or more time.

For example, we think that it is not reasonable that a time charter trip described as "about 80 days without guarantee" actually takes 40 days or 120 days.

It is submitted that reservations such as "about" and "without guarantee" do not exonerate time charterers from their duty to furnish a reasonable and realistic voyage estimate. This was aptly explained by the panel in S.M.A. No. 2439 as follows:

"We do not accept charterers' argument that the expression 'without guarantee' vitiates the 40/45 days they proffered to owners as an indication of the length of this voyage, thereby leaving this an open-ended trip time charter. We subscribe to the principle that 'without guarantee' only protects charterers from fortuitous delays beyond their control, otherwise they are obliged to estimate realistically any representation as to voyage duration they give to owners

to rely on. Thereafter, they must also prosecute the voyage in good faith, in an efficient manner, and without delays that arise out of their own negligence if they are to be held blameless for not adhering to their warranty."

However, in S.M.A. No. 2435 the panel "shortly and sweetly" denied owners' claim for overlap. The vessel was employed for "one time charter trip...duration about 80 days without guarantee". The voyage lasted 97 days and owners claimed for the overlap holding that time charterers knowingly underestimated the voyage duration during chartering negotiations.In denying owners' claim the panel decided:

"Owner's counterclaim for overlap is denied. The charter called for a time charter trip of '...about 80 days without guarantee...' . The voyage duration was 97 days. There simply was no misrepresentation of the voyage duration, and the charterer did not breach the charter in this respect."

i.e. an overlap of seventeen days or, in this case about 21 per cent. were taken to be a reasonable overlap for a time charter trip described as "about 80 days without guarantee".

As indicated in S.M.A. No. 2439, in case an overlap results from causes which are eventually determined to be beyond charterers' control, such as strikes, lock-outs etc., such overlap will be "admissible" in the sense that charterers are not at fault and, hence, owners will not be entitled to remuneration in excess of the agreed rate of hire for the overlap period. This is illustrated in S.M.A. No. 1983 in which the panel decided *inter alia* that:

"As far as the lock-out period at Crofton is concerned, the panel finds that this period cannot be used as an argument by Owners to establish an overlap. The delay was certainly beyond the control of Charterers and not within the contemplation of this contract."

This also appears to be the position under English law. In the *Dione* judgement* (which, albeit essentially concerning the question of legitimate versus illegitimate last voyage, we find relevant) the judge said *inter alia* that:

"..If the charterer sends the vessel on a legitimate last voyage - that is, a voyage which it is reasonably expected will be completed by the end of the charter period, the shipowner must obey the directions. If the vessel is afterwards delayed by matters for which neither party is responsible, the charter is presumed to continue in operation until the end of that voyage, even though it extends beyond the charter period. The hire is payable at the charter rate until redelivery, even though the market rate may have gone up or down."

It should therefore be kept in mind that although there is an inherent uncertainty as to duration which cannot be eliminated whenever a vessel is fixed for a time charter **trip** such uncertainty (and thus the risk of parties ending up in a dispute) is increased considerably when adjectives such as "about" and "without guarantee" are added to the intended period of employment.

Hence, "**be more specific when stipulating the earliest/latest redelivery dates for the vessel.**"

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* *The* Dione*, LLR (1975) Vol. 1, p. 115*

Shelltime 4 - illegitimate voyage orders

Enquiry: The vessel was fixed for 18 months, 15 days more or less in charterers' option. Charterers were entitled to add off hire periods to the period of hire but opted not to utilise this option. Accordingly latest admissible redelivery of the vessel was 28 December 1990. On 7 December 1990 charterers instructed Master to proceed to U.S. West Coast to load cargo destined for the Far East upon completion of which vessel would be redelivered to owners.

Voyage calculations revealed that redelivery of the vessel would then be towards the end of January 1991 and, hence, since the period of 18 months plus 15 days ended 28 December 1990, owners considered charterers' voyage orders illegitimate and, accordingly, charterers should redeliver the vessel at the port where she would be expected to complete 8 December 1990. Alternatively, charterers would remunerate owners by way of increased rate of hire reflecting the market rate for the overlap period if the voyage should after all be performed.

Charterers adopted the view that clause 19 (Final Voyage) applied. This clause reads in part (lines 194/197) as follows:

"If at the time this charter would otherwise terminate in accordance with Clause 4 the vessel is on a ballast voyage to a port of redelivery or is upon a laden voyage, Charterers shall continue to have the use of the vessel at the same rate and conditions as stand herein for as long as necessary to complete such ballast voyage, or to complete such laden voyage and return to a port of redelivery as provided by this charter, as the case may be."

BIMCO's advice was sought as to whether owners or charterers were right.

Reply: We agree with owners that in so far as charterers have not utilised their option to add off hire periods to the period of hire then charterers are entitled to no further margin than the 15 days more or less.

Clause 19 does not come into play. It is not a "catch all" clause which would entitle charterers e.g. two days prior to expiry of the maximum period to send the vessel on a last voyage which is reasonably expected to last say thirty days. Although it may be said that the clause may give charterers a bit of leeway in terms of exceeding the maximum period of hire still, charterers are not exonerated from furnishing voyage instructions in compliance with which the vessel is reasonably expected to be redelivered within or (because of the presence of clause 19) shortly after the allowed maximum period of hire. An overlap of about one month would fall outside the scope of this clause.

This being so, charterers have essentially no alternative to redelivering the vessel at the present port where she is expected to complete 8 December because since voyage orders for the U.S. West Coast/Far East voyage would in the circumstances be illegitimate owners could in fact refuse to follow such orders and call for revised legitimate orders, and if no such orders were forthcoming owners may treat the charterparty as discharged, seek alternative, mitigating employment and claim damages.

Should owners decide to adhere to the illegitimate voyage orders it is most important that they put time charterers on notice that owners consider the orders illegitimate and that owners adherence to such illegitimate orders is not a waiver of owners' rights to claim damages for

the breach. In this context we refer to the summary of a recent English judgement which appeared on pages 20-21 of BIMCO Bulletin 1/91.

Outcome: The Secretariat was pleased to receive the following from the members: "We are pleased to inform you that your stand has helped us resolve the matter amicably with the charterers".

Time charter - hire of tug hawsers

Enquiry: In the course of the time charter, vessel called Antwerp. Tug hawser was used and time charterers debited owners for the incidental costs in that they adopted the view that vessel should provide hawser thus obviating the need for hiring such material and if hired it should be for owners' account. In owners' view this should be considered a normal part of the towage fee and, hence, for time charterers' account.

Reply: From time to time BIMCO is confronted with this question. The Secretariat consistently expresses the view that this item should be absorbed by time charterers unless the governing charterparty contains express words to the contrary.

Although hiring of towing lines may not be compulsory, it is, as far as we know, in practice, unavoidable and the ensuing expense should, therefore, be for time charterers' account. It is, of course, correct that time charterers can expect that the vessel has her own towing lines on board (one could envisage that the vessel may be directed to ports where towing lines cannot be hired at all from tug companies, etc.). As this is not, however, an isolated case, one may suspect that the tug boat crews use "hard sell" practices and, as we see it, it is not for the Master to enter into arguments on this point at the most inappropriate moment.

At any rate, if the vessel's usual lines which can be used for towage at the majority of ports are, for one reason or another, not suitable for the particular port, or "hard sell" practices are the order of the day, then obviously the Master has no choice but to "hire" towing lines locally. Against such a background it would be for the time charterers (if they wish to avoid the expense) to instruct the port agent **in advance** to give this matter his special attention, and to oppose the apparently, "hard sell" practices.

The question of use of tug hawsers was one of the points in dispute in a recent New York arbitration award* which arose under a BALTIME 1939 C/P. Charterers charged owners for the use of hawsers used by tugs at Terneuzen in the amount of USD 951.91. Owners rejected the charges as being contrary to a part of clause 4 reading:

"Charterers to provide and pay for all port charges...tug assistance... all ropes...including special ropes, hawsers required by the custom of the port for mooring..."

Held, that "(T)here is no indication the vessel was requested and declined to supply its own hawsers, therefore it would appear this is an automatic procedure imposed by the tug companies with a corresponding charge that falls within Charterer's responsibility under the above proviso."

Admittedly, it may be said that in the circumstances the decision outlined above is hardly

surprising. There is, however, in our opinion, good reason to maintain that even in the absence of clear provisions in the C/P such as clause 4 of the BALTIME 1939 C/P still, as long as it is what in the arbitration award is referred to as "an automatic procedure imposed by the tug companies" which may be equated with "hard sell" practices it forms an integral part of the port charges which as a rule must be absorbed by the time Charterers as a matter of routine.

** S.M.A. No. 2705*

T/C - delivery taking inward pilot (TIP) - vessel waiting for pilot

Enquiry: The vessel has been fixed for a timecharter trip basis delivery TIP with laydays/cancelling 2/7 September. Vessel arrived off the port 7 September but despite Master's efforts pilot did not board and Master is given to understand that the cargo is not ready and that the port is congested. Owners maintain that vessel is on hire since her arrival at the pilot station whereas time charterers hold the view that vessel is on hire only as from taking inward pilot.

Reply: The stipulation "TIP" should, in principle, be avoided, partly so as to avoid time charterers' attempts to manipulate commencement of hire by seeking to saddle owners with the consequences of congestion and partly so as to prevent that owners have to absorb the waiting time which may be incurred if there is no congestion but weather conditions prevent the pilot from embarking on vessel's arrival in the area where pilots usually embark.

This said, stipulations like "taking inward pilot" should serve to determine point and time of delivery and not as a means of passing on to owners delays due to congestion or if port authorities prohibit berthing of the vessel because cargo is not ready, i.e. hindrances at a place beyond the point of delivery. These matters must be considered as a consequence of the commercial operation of the vessel which falls within charterers' sphere of risks.

This is supported by the decision reached in a London arbitration award rendered in 1980*. The delivery was agreed to be basis "TIP". Vessel arrived prior to first layday but because of congestion the pilot boarded and took vessel in only seven days after her arrival. Owners claimed that hire started at 00.01 hours on the first layday whereas time charterers said it started only when the pilot boarded.

It was held that owners were right. It should be implied that delivery was effective when the ship was in a position to take inward pilot. If such a term was not implied, charterers might be able to cancel although the ship was fully ready, if no pilot were provided before the cancelling date. There was a strong case for presuming that the parties intended to put upon the owners the risk of weather preventing a pilot embarking, but not the risk of congestion, and the result of the implication was therefore not to make the words equivalent to "on arrival pilot station" as could be argued.

Furthermore, port arrangements were in the hands of charterers under this form of charterparty. This being so, owners are correct in maintaining that vessel was delivered when she came to rest at the place where the pilot could have embarked had there been no congestion and/or lack of cargo.

Note: Although the decision in the above summarized arbitration award was in owners' fa-

vour, it should still be kept in mind that owners may well have to absorb the delay in case it is solely adverse weather conditions which prevent the pilot from boarding the vessel.

**) A summary of the London arbitration award referred to above appeared in Lloyd's Maritime Law Newsletter No. 23 of 18 September 1980.*

■ Time charter trip about 60 days without guarantee

The vessel was fixed for one time charter trip for about 60 days without guarantee. The intention was one laden leg from the Continent to the Indian Ocean/Far East in charterers' option. The vessel was redelivered in India after 48 days. Out of this period there were about 10 days off-hire.

Enquiry: Please advise whether owners can claim the balance period up to 60 days as agreed or up to whatever minimum period the definition "about" and "WOG" would allow. Since charterers claim vessel should be off-hire for 10 days and vessel has, therefore, been on hire for only 38 days, please also advise whether owners could claim for charter hire for the balance period from the 39th day onwards?

Reply: It must be realized that even if the parties had agreed that the period should be "60 days" a margin would have been implied. Hence, owners cannot reckon with a minimum duration of 60 days. When it comes to which allowance is imported by the qualifications "about" and "without guarantee" it is not possible to submit rigid guidelines which may be applied irrespective of the circumstances or, put in another way each case must be considered on its own merits. We think that the articles which appeared on pages 36/37 of BIMCO Bulletin 5/90 respectively pages 19/20 of BIMCO Bulletin 1/91 illustrates the inherent difficulties of these matters.

To the second question the answer is that the off-hire period(s) is considered as part of the contracted period and, hence, this matter cannot be approached as suggested in the enquiry; the off-hire periods count as part of the charter period unless the charter expressly provides that off-hire periods may be added to the period of hire. Hence, the period will commence with vessel's delivery and end with vessel's redelivery, irrespective of off-hire periods.

■ Deviation for dry-docking

From time to time, the Secretariat has been confronted with disputes concerning deviation for dry-docking. For the present purposes, the question is considered in the light of the owners' contractual right to dry-dock the vessel in the course of maintenance of the ship. The actual dry-docking period is not in question and is not, therefore, commented on.

Generally speaking, these disputes fall into two categories:

1. The owners order the vessel to dry-dock *en route* between her last port of discharge and next port of loading.

2. The vessel is unfixed after completion of discharge and is ordered by time charterers to proceed in a certain direction "for orders" following which owners may be able to arrange

dry-docking at a port generally within the direction in which the vessel has been ordered to proceed.

Usually, time charterers hold the view that the vessel is in principle released to owners on completion of discharge at the last port prior to dry-docking, and the vessel must therefore proceed to the dry-dock in owners' time, i.e. off-hire takes effect immediately after completion of discharge.

BIMCO has consistently expressed the opinion that there is an aspect which is inextricably linked with this matter and that is what might be termed the key element in off-hire, viz. loss of time. This being so, the starting point for considering the off-hire period in this context should be vessel's next employment. If her next employment has been arranged and the next port after dry-docking is known, it should be comparatively easy to calculate the deviation for dry-docking by comparing the distances:

Last port of discharge/dry-dock/next loading port (the actual voyage), and,

Last port of discharge/next port of loading (the artificial voyage).

The extra mileage when comparing these voyages would be what should be performed in owners' time. For example, vessel's last port of discharge prior to dry-docking is Bangkok, Thailand. Next port of call under the time charter is Jakarta, Indonesia. Dry-docking has been arranged in Singapore. The artificial voyage would thus be Bangkok/Jakarta. The distance between these two ports (based on readily available distance tables) is 1,291 NM. The actual voyage will comprise two legs, viz. Bangkok/Singapore = 831 NM and Singapore/Jakarta = 525 NM.

The actual voyage is then 831 NM + 525 NM = 1,356 NM.

The artificial voyage would have been = 1,291 NM.

The distance to be performed in owners' time = 65 NM.

When vessel's next employment is unfixed at the time she is to proceed to dry-dock, it is probably not possible to compute the actual mileage to be performed in owners' time, i.e. the computation will have to be deferred until her next employment is known. The principles, however, remain the same.

It may reasonably be assumed that the actions of the parties are to some extent dedicated by what the other party does. For instance, if the vessel is unfixed after Bangkok and is ordered to proceed "South towards Jakarta", then owners may seize the opportunity to dry-dock the vessel at Singapore. Owners may then run the risk that time charterers actually fix the ship which would have required a change of course prior to vessel's arrival at Singapore (for instance, if the next port of call will be Manila). In such a situation, the deviation would, of course, be greater as would the distance to be performed in owners' time.

Another situation may be that owners for reasons of their own (but in agreement with time charterers) need to dry-dock the ship far from her current whereabouts. For example, if she is

mainly trading in Northern Europe, but owners', for reasons of their own, wish to dry-dock the vessel in Genoa.

If time charterers are mainly trading the vessel in Northern Europe, they may not have business readily available for the ship at or in the vicinity of Genoa, but assuming that the Mediterranean is not excluded from the trading area, it may reasonably be surmised that time charterers will, nonetheless, attempt to find employment for the ship after dry-docking.

If time charterers succeed in their endeavours and the vessel is fixed out of e.g. Marseilles, it is submitted that the "off-hire distance" would be Genoa/Marseilles. This is so, because insofar as the ship should load at Marseilles after dry-docking, the distance from the last port of discharge at the North European port to Marseilles would be a distance which the vessel would have to perform in any event.

Put in another way, it is not until vessel's next employment is known that it will be possible to ascertain the duration of the off-hire, and although time charterers may claim that it is solely because the vessel was to be dry-docked in Genoa that they sought (and found) business out of Marseilles, still, the decisive factor in determining the off-hire will be vessel's next employment.

This means on the other hand that, if time charterers do not manage to find employment for the vessel from the area where she has dry-docked, and/or the vessel is needed in North Europe as soon as possible after the dry-docking, then the "off-hire distance" would be from the last port of discharge in Northern Europe and until she is back in the next port in that area after dry-docking.

The loss of time/deviation problems in a situation in which vessel's next employment was not fixed at the time she left the last discharge port to proceed to the dry-dock, were considered in a High Court judgement (the *Ira*, Queen's Bench Division (Commercial Court), 13 May 1994).

Parties mutually agreed that the vessel would dry-dock in Greece after discharging in Ravenna. Accordingly, vessel proceeded to Piraeus, where she was dry-docked. On 24 January they informed time charterers that vessel would be at their disposal when she dropped outward pilot at Piraeus the following day at noon. On the same day, charterers chartered the vessel to load at Novorossiysk in the Black Sea.

The charterers contended that the time lost by the dry-docking was from dropping outward pilot Ravenna. Owners contended that the time spent sailing to Piraeus was not lost to charterers because that voyage was *en route* to Novorossiysk and therefore not lost.

The matter was submitted to arbitration. The arbitrators upheld owners' contention. Charterers appealed to the High Court.

The question whether the vessel was operating on the orders of the owners or charterers was not to the point of calculating what time was actually lost to the charterers as a result of an off-hire event. Obviously, during the time the vessel was under directions to go to the dry-dock and during the dry-docking itself, an off-hire event had taken place. But the fact that it had taken place did not automatically supply the answer to the question of what time had been lost as a result of that occurrence.

Here the tribunal had to count the time and count the duration of the off-hire event but it then had to go on to see what causative effect that had on the charterers in the particular circumstances of the case.

It was obvious that in certain circumstances it was not possible to determine what loss of time had occurred until the end of the off-hire event. If one asked the question at that stage in this case, i.e. as at 25 January what loss of time as a result of the dry-docking of the vessel had charterers suffered, there could only be one answer.

They had not lost the time that it had taken for the vessel to sail from Ravenna to Piraeus, apart from the small amount of time involved in the deviation into that port for the purpose of dry-docking. The arbitrator approached the question in the right way; he asked himself the right question and he produced the right answer.

The appeal would be dismissed.

T/C - redelivery notices not observed

Enquiry: The vessel was fixed for about 6 months time charter. Redelivery notices to be given were 15 and 10 days approximate notice and 3 and 1 days definite notice. Time charterers have not observed these notices and/or they submit the notices in a somewhat haphazard fashion. Please advise whether owners are entitled to refuse redelivery of the vessel until timely notices have been given.

Reply: It must be realised that properly given notices are not prerequisite for redelivery of the vessel. Failure to submit notices as agreed is tantamount to breach of contract. Consequently, if time charterers do not comply with the contractual agreement pertaining to submission of redelivery notices then owners cannot refuse to accept redelivery of the vessel. Their course of action is to seek suitable employment of the vessel (owners' mitigation duty) and subsequently lodge a claim in damages, if any, flowing from time charterers' breach. For example, if the vessel is redelivered without any notification and therefore will have to remain idle for a period of time until owners manage to fix her next employment, they should be able to claim the actual expenses of vessel having to wait idle from the time charterers.

T/C - B/L signature

The Secretariat has recently been confronted with enquiries concerning the implications of provisions in the time charter party pertaining to signing bills of lading on Master's behalf. That time charterers wish to have the possibility to sign bills of lading on Master's behalf is, of course, nothing new nor is it questionable *per se*. There is, however, cause for alarm when the clause reads as follows:

"Charterers and/or their agents are hereby authorised by owners to sign on Master's behalf, bills of lading as presented in accordance with Mate's receipts without prejudice to this charter party, but charterers to be responsible for all consequences that might result from charterers and/or agents signing bills of lading **not adhering to the remarks in mate's receipts**".

At first glance the clause may appear to be a reassuringly familiar express indemnity, but the

words underlined are tantamount to a carte blanche for time charterers or their agents to sign "clean" bills of lading **even** if Mate's receipts contain remarks as to the apparent condition etc. of the cargo which should, therefore, also appear in the bills of lading. Hence, if charterers decide to issue "clean" bills of lading irrespective of the fact that the apparent condition of the cargo may warrant remarks therein, the ensuing liability when a cargo claim is lodged by receivers/consignees will rest with owners.

If one envisages a situation in which time charterers cannot or will not adhere to the indemnity owners may find that the indemnity is unenforceable, i.e. the courts will decline to handle a case involving such an indemnity. Similarly, owners may find that their P&I Club will decline to cover owners because, it is submitted, the above indemnity is similar to "indemnities" proposed by charterers under voyage charter parties against owners/Master signing "clean" bills of lading although the cargo is not "clean".

Consequently, provisions such as the one quoted above should not find their way into the charter party. We would refer to clause 30 of NYPE 93* which leaves no option but to issue/sign bills of lading in conformity with Mates or tally clerk's receipts even though time charterers may sign bills of lading on Master's behalf. Readers are also referred to the article which appeared on page 36 of BIMCO Bulletin Volume 90 No. 2/95 as well as the "Bill of Lading" section of this book.

* *See BIMCO's* Forms of Approved Documents

■ T/C - speed and consumption claims

It is hardly a surprising statement to make that parties to a time charterparty not unusually at some stage become entangled in a dispute in the context of vessel's performance, i.e. a speed/consumption claim.

The major obstacle as it were is that, weather is by and large a matter of **fact** which parties however tend to see in different light. Another problem is that time charterers often employ a performance monitoring company to vessel's performance. The information on which such a monitoring company bases its evaluation may be e.g. statistical material for a certain area rather than based on current, factual information at the particular place and time and, hence, the conclusions drawn, i.e. the performance details are bound to differ from vessel's log book entries.

It is not, of course, suspect *per se* to employ a performance monitoring company. Time charterers pay for a certain service and that they will want to see whether they get value for money is easily understood. There is, however, a deplorable tendency to take the performance evaluations at face value, i.e. the slightest indication in such a performance evaluation will be exploited to lodge a speed/performance claim. We have been involved in disputes in which time charterers even used a **preliminary** performance evaluation as alibi for lodging a speed/performance claim and - which is the crux of the whole matter - arrange for deductions from hire.

We are not suggesting that time charterers are **always** wrong and owners are **always** right (see reference to S.M.A. award No. 2040 below). The main problem is, however, that time charterers frequently deduct from the hire without the in-depth, thorough analysis of vessel's per-

formance which is required before it is possible to ascertain with any degree of certainty whether time charterers actually do have a justified claim.

Hence the proper approach is that owners are put on notice that they may be confronted with a speed/performance claim (in many cases owners will know whether something may have happened indicating that time charterers may have a justified claim). Parties must then endeavour to establish whether and if so then to which extent such a claim may be justified and only once this has been achieved deduction from hire may take place.

Generally speaking, reports from performance monitoring companies are considered evaluations rather than statements of facts as it were. This may be illustrated by the comments of the tribunal in a London arbitration award in which it was **held**, *inter alia*,

"[T]hat the Ocean Routes report was of course based on information received from other vessels either following the same route or in the vicinity. The report should not be viewed as contradictory evidence as to what was written in a vessel's log. It was well known that weather could be very local and in any event the report was based on too few indications from other vessels to disregard or contradict the log entries."

New York arbitrators seem to follow similar considerations. In S.M.A. award No. 2060 the panel held, when being asked to disregard log entries and consider only OceanRoutes' performance evaluation, *inter alia*,

"[T]he panel is not convinced that the vessel's records are so at variance with any conceivable prevailing condition that they lack integrity or that no reliance whatsoever should be given to them."

and in S.M.A. award No. 2005 the panel reached a similar conclusion saying, *inter alia*, that

"OceanRoutes' study has not convinced us that the vessel's records are so at variance with any conceivable prevailing condition that they lack integrity and no reliance whatsoever should be given to them. OceanRoutes' study, as thorough as it is, relies upon observations provided to them by many sources and it was admitted that differences can exist between vessel's reported conditions and OceanRoutes'* conclusions of reported conditions."

In S.M.A. award No. 2040 the panel commented a bit further as follows:

"The evidence of the ship's Logs and the Voyage Analysis of OceanRoutes do not differ in so far as distance travelled and time used are concerned. However, there are large discrepancies in the reported weather conditions in the evidence from these two sources. Under most circumstances, where the differences are not major, most panels will tend to accept the reports of the ship, as the Master and Officers are deemed to be the best judges on the spot of actual conditions.

A heavy burden is placed upon Charterers to show that the ship logs are not reliable and

** It ought to be mentioned that it is purely incidental that it is OceanRoutes which appear in the arbitration awards quoted in this article.*

should be disregarded. The testimony and documentary evidence of OceanRoutes submitted by Charterer in this case is detailed and shows that the ship's reports require a closer scrutiny than usual as the disparity is too great to be considered normal."

In the event the panel found that charterers did in fact manage to lift the heavy burden placed upon them in terms of disproving ship's log thus basing their decision on, *inter alia*, the reports from OceanRoutes.

The Secretariat has seen clauses which prescribe that if there are discrepancies between vessel's log entries and a performance monitoring company, then the information submitted by the latter should be considered decisive. From the contents of this article it should be apparent why such provisions may well work in owners' disfavour and, hence, why such provisions should be approached with the greatest caution.

A related problem which crops up from time to time is that the performance monitoring company employed by time charterers may suggest to Master to take a certain route. In S.M.A. award No. 2125 such a situation was dealt with.

Charterers informed Master that "[Y]our vessel has been nominated to Marincom who will provide you with weather and routing service..".

In the event Master followed another route than suggested by Marincom. Charterers argued that Master's failure to follow the instructions was breach of clauses 8 and 11 (of the NYPE 1946); they even suggested that it constituted a "default of men" under clause 15. It was **held** that

"Clause 11 confers a duty upon Charterer to provide the Master with written 'instructions and sailing directions', and implies a duty upon the Master to follow them.

However, such instructions do not give Charterer dominion over the operation and navigation of the vessel; the responsibility for this has always rested with the Master and Owner, and is emphasized by the clear wording of Clause 24, *supra*.

Because, under a time charter agreement, the risk of delay due to weather is upon Charterer, there is no question that Charterer has the right to nominate a weather routing service of its choice, for its account.

However, the Master is not under an absolute obligation to follow the advices of any routing service; he is the sole judge when it comes to deciding upon the best and safest course to take from point of origin to destination, having in mind the best interests of both Owner and Charterer and the safety of his vessel, cargo and crew."

Charterers' claim therefore failed.

■ Time charter - "customary" pilotage

The Secretariat is confronted from time to time with inquiries as to whether pilotage in a certain area may be "customary". It seems that more and more time charter parties refer to such pilotage. BIMCO is not sure how and when the expression crept into a time charter party

the first time. However, it is fairly certain that the implications of the salient provision are obscure, even to those who invented it. The point is that it is quite difficult, if not impossible, to establish whether or not pilotage in a certain area may be termed "customary".

The first difficulty is that it is necessary to find an objective yardstick when trying to establish whether or not pilotage may be "customary". Various factors will have to be considered; vessel's size, the frequency of the particular size plying the particular area, the total number of ships plying the particular area, the time of year, etc., etc.

For instance, it may be common for vessels of a particular size to employ a pilot, but what if the particular size is a minority in the particular area? Can one say then that pilotage in the area is "customary"? If the Masters employed by the particular ship-owner as a rule employ pilots when trading in the particular area does that make it "customary"? Would time charterers have a point if they could show that the previous five ships in their time charter did not employ pilot when trading to the particular area?

The next difficulty is to find objective and unbiased factual information as to the frequency with which pilots may be employed. If pilotage is not compulsory and ships may sail freely in the area, the ships not employing pilots may not be registered and/or monitored in a fashion which is useful in the particular context, in which case it will be impossible to obtain the required factual information. If the local pilot organisation is asked, their reply may, understandably perhaps, reflect whether the pilots hold the view that pilotage is recommended, and at any rate, in a situation such as the one outlined here, a statement from the pilotage organisation could really only be considered as an opinion rather than a statement of fact.

Last, but certainly not least, the absence of factual information makes it necessary for the parties to submit what is essentially an informed guess. A reasonable assumption is that parties will not see eye to eye on the salient matter, not least because such an informed guess may be influenced by, *inter alia*, the costs involved.

As readers will gather from the above, reference to "customary" pilotage is a perfect dispute-breeder and we would reiterate the recommendation found in, *inter alia*, on page 35 of this book reading:

"Customary" has uncertain implications as views may differ as to what is customary in a certain area, period and size of vessel, and it is not easy to find any authorities on "customs" of this kind.

■ Time charter - cleaning sludge tanks

From time to time the Secretariat is confronted with enquiries as to whether owners or time charterers have to pay and arrange for removing slops/sludge from vessel's fuel tanks. Seen from owners' point of view, it is the time charterers who pay and arrange for bunkers to the ship in the course of the time charter employment and, hence, it could appear to be within their sphere of responsibility to remove the remains as it were of the bunkers supplied to the ship.

This is probably not, however, a viable point of view. If one goes back to the days of steam engines fed by coal, there were ash pits to be cleaned every once in a while and we do not

think that there were in those days anyone who questioned that such cleaning would fall within owners' sphere of responsibility.

Nowadays when ships run on "liquid coal", that is fuel oil of various denominations it could be said that all that has really happened in terms of principles is that the remains as it were have moved from the ash pits to the bunker tanks. The question of cleaning would therefore, as we see it, remain the same, i.e. in the absence of specific language in the contract regulating this question differently, it would fall within owners' sphere of responsibility to defray the costs incidental to cleaning vessel's bunker tanks as and when circumstances so require, this work being one aspect of owners' maintenance duty. In a London arbitration award rendered in 1984 the tribunal **held**, *inter alia*, that:

"The cleaning of tanks was appropriately an owner's problem, and frequent accumulations of sludge were to be expected in present times. Fuel qualities had deteriorated greatly.

It was current practice among many owners and charterers that the cleaning of sludge tanks was an owner's responsibility unless the fuel could be demonstrated to have an unusual specification and carried inordinately heavy sediment and agglomerated matter is suspension."

Readers should be guided accordingly.

■ Time charter - delivery/redelivery bunkers

As readers may be aware, time charter parties sometimes contain provisions prescribing that bunker prices at delivery and redelivery are to be according to a quote from a particular supplier at the respective ports. All too often, however, parties find out **after** the agreement has been made, that the particular supplier does not quote prices at the particular ports, i.e. such provisions are potential dispute-breeders.

For example, the clause may read as follows:

"Bunker prices at delivery and redelivery to be as per the [bunker supplier's] listed prices at the respective ports at the time of delivery and redelivery respectively or at the nearest [main] bunkering port thereto".
The problems with clauses of this nature are threefold:

Firstly, the particular supplier may not list prices at the particular ports.

Secondly, there is, as far as we know, no all-embracing and universally acknowledged definition of what may constitute a "main bunkering port" or even a "bunkering port" for that matter.

Thirdly, it is unclear whether the "nearest [main] bunkering port" must be a port at which the particular supplier lists prices or whether it can be just any port at which bunkers are available.

How does one assess what a "bunkering port" may be - is it an "ordinary" port at which bunkers are obtainable or are certain other features required? If so, then which? The same goes for a "main bunkering port" - does the port have to sell a certain quantity of bunkers to be(come) a "main" bunkering port and if so, then how much? And are other features required?

As may be gathered from the above, BIMCO thinks provisions such as these should preferably be avoided altogether but if that is not possible then at least be approached with great caution because they are potential dispute breeders. Why not simply use the printed text of one of the C/P forms recommended or approved by BIMCO, such as clause 6(a) of the GENTIME, clause 5 of the BALTIME 1939 or clause 9 of NYPE 93?

■ GENTIME - deviation to save life and property

Enquiry: The vessel was fixed on the basis of the GENTIME time charter. During the currency of the charter the ship was involved in a salvage operation. It began as a life saving at sea operation and ended with the salvage of the ship itself. Please advise if time charterers are allowed to place the vessel off-hire during the operation outlined above.

Reply: Initially we would say that, BIMCO has always expressed the view that time spent saving or attempting to save life and property at sea are not off-hire events. This view is reflected in clause 9 (b) of the above charter party reading in part

"In the event of the Vessel deviating.....for reasons other than to save life and property the Vessel shall be off-hire...."

We believe that the situation outlined in the present case is often the case, i.e. there is a combination of saving life and property. In such situations there is a reward aspect for the salvage of the property.

This is governed by clause 14 (c) which prescribes, perhaps unsurprisingly, that the salvage proceeds are to be equitably distributed **after** deduction of "*the Master's and Crew's proportion.....*including *hire paid under the Charter Party for time lost in the salvage...*"

The **combined** effect of the above provisions is that the ship is not off-hire during the salvage operation, but the time charterers are entitled to recoup themselves in terms of the hire paid during the salvage operation **prior** to distributing the salvage proceeds. Consequently, the answer to your question is that the vessel is not off-hire, but time charterers are entitled to deduct the hire paid from the salvage proceeds.

■ Time charter - commission on ballast bonus

Enquiry: The Secretariat is confronted from time to time with enquiries as to whether commission is due on ballast bonus.

Reply: BIMCO has always held that the answer to that question should be no.

This is so because, the general rule is that commission is payable only on the amounts expressly stated in the contract. For example, in the GENTIME, clause 23 reads in part as follows:

"The Owners shall pay a commission....on any hire paid under this Charter Party..."

However, ballast bonus is not, in our opinion, tantamount to "hire".

The point is that a ballast bonus is paid to the owners to bring the ship to the place as may be required by the time charterers.

Moreover, by agreeing to remuneration by way of ballast bonus the owners defray the entire risk for delays because of bad weather etc. during the ballast voyage, i.e. it may be argued that the ballast bonus is intended to cover the owners' actual costs of bringing the ship to the position where the time charterers may use it.

If ballast bonus were to be considered equal to time charter hire, it ought to be calculated on the same basis as the hire and then the time charterers may just as well have taken delivery of the ship at the port where the ballast voyage commenced.

This being so, it is BIMCO's consistent opinion that the governing contract should contain express provisions to that effect if commission is payable also on ballast bonus.

■ NYPE C/P - commission on advances

The above-mentioned charter party, as well as some other standard time charter party forms, contain provisions allowing the time charterers to charge the owners commission, typically 2½ per cent., if the owners request the time charterers to advance funds to the Master.

The relevant provision in the 1993 edition of NYPE appears in clause 11(d) and reads as follows for the present purposes:

Cash for the Vessel's ordinary disbursements at any port may be advanced by the Charterers, as required by the Owners, subject to 2½ per cent. commission and such advances shall be deducted from the hire.

From time to time there appears to be a little confusion as to when time charterers are actually entitled to charge commission according to a provision such as the one quoted above.

As it follows from the clause, the starting point is that the funds must have been **advanced**. An "advance" occurs when, besides hire instalment as due, the time charterers **advance** a further amount (within the period covered by the particular hire instalment), i.e. basically the hire instalment plus an "advance". The time charterers may then recoup the advance themselves by "deducting" this advance plus the agreed commission from the **next** hire instalment.

Conversely, there is no "advance" when, on remitting the hire instalment as contractually due, the time charterers pay less than is due or in other words "deduct" from the hire because they expect that during the period covered by the particular instalment there will be certain disbursements expenses which the owners will eventually have to defray. In this situation, time charterers would not be entitled to commission.

■ Time charter - Cleaning clause

Readers will probably be aware of the type of clauses pertaining to interim cleaning of holds during the time charter period, which prescribe that cleaning is to be done by the crew, if possible, against an agreed remuneration.

Underlying this type of clauses is that even though the parties agreed to remuneration to the crew and the vessel remains on hire, the crew is to render "customary assistance" to the time charterers, i.e. the crew would extend to the charterers the same services as would be rendered if the vessel was not employed in time charter. This would give the charterers a certain assurance that the crew would not just "sit on their hands" and it is in this light that the important provision in this context should be considered, viz., that if the ship is turned down despite cleaning by the crew, this will not result in off-hire.

A new breed of this type of clause has apparently entered the market. An example of such clause reads as follows:

"On subsequent voyages, if requested by the charterers, the vessel's crew is to clean holds provided local regulations permit. Cleaning to be performed in charterers' time. Charterers pay US$ …. per hold for such cleaning. Maximum four days allowed for cleaning from coal to grain and maximum three days from coal to other cargoes. Such cleaning to be to the satisfaction of the proper authorities failing which vessel is to be placed off-hire until final passes are obtained. Owners are to clean the vessel immediately upon rejection and with the utmost despatch."

The obvious effect of the above clause is that even if the crew demonstrably renders "customary assistance", that is, renders the same services to the time charterers as would be the case if the ship was not employed in time charter, the vessel may, nonetheless, be off-hired under the above provision if the "proper authorities" for one reason or another pertaining to cleaning are dissatisfied, and turn down the ship. Another interesting question is what the effects of the clause may be if the ship is to be cleaned from a commodity other than coal. Will the owners be worse off than the three days set out when cleaning from coal to a commodity other than grain? Would Petcoke be considered "coal" under the above clause? If not, how much time would be available to the crew for cleaning purposes?

Another question is whether the crew is always able to clean the vessel's holds regardless of the type of cargo loaded. If this were not the case, the costs pertaining to hiring cleaning gang(s) from shore would rest with owners if the crew were unable to clean "if requested by the charterers".

Hence, acceptance of clauses such as the above may have costly implications and owners may discover, albeit too late, that the agreed remuneration to which they have agreed is dwarfed by the off-hire and/or cleaning expenses.

Time charter clauses to be avoided

While this is a vast topic, one type of clauses invariably causes problems: the poorly drafted "home-made" provisions that do not stipulate exactly what they actually wish to achieve.

In many instances, these provisions either miss the point or are worded in such a manner as to make them ineffective.

Breaching IWL clauses

It is fairly common that a time charter party will contain a clause allowing the charterers to

order the ship to a place outside Institute Warranty Limits (IWL). There is, of course, a reason why the underwriters have made the limits; trading outside those limits may be more dangerous to the ship, i.e. the risk of damage increases once the ship trades outside the IWL limits. Generally, time charterers are aware of this and may, therefore, propose a clause such as the following:

The charterers are allowed from time to time to order the vessel to proceed to a port or place outside the current IWL limits against payment of the additional insurance premium incurred.

Such a clause is acceptable so long as there is no reason to dispute the additional premium demanded by the insurers and so long as the vessel suffers no damage. Assuming that the vessel is in fact damaged by ice, there is nothing in the clause which would support a claim from owners that the time charterers must defray the loss of time needed for the repairs. This is particularly relevant if the ship is damaged to an extent that affects its seaworthiness. The aforementioned clause would be to no avail to the owners as regards the time used for repairs and charterers might argue that the repairs may be put off until some time in the future when the ship would undergo survey or similar, if vessel's seaworthiness is not affected. Hence, the provision fails on two counts: it does not specify that the owners may take out additional insurance as they see fit, nor does it specify that the time needed for repairs of damage to the vessel caused by complying with time charterers' orders to breach IWL is to be absorbed by the charterers.

Performance clauses

A typical clause looks something like this:

The time charterers may from time to time employ a performance monitoring company at their expense. The company will furnish the master with information pertaining to preferred route, which the master is to adhere to unless there are valid navigational reasons for not complying with such directions. In the event of consistent discrepancies between the reports of the performance monitoring company and vessel's logbooks, the former are to be considered conclusive in determining vessel's performance.

In earlier times, the reference to which route to follow was deemed to be an order which charterers were not entitled to give because it appertains to the navigation of the ship and thus they would not be considered orders as to employment. However, with the *Hill Harmony* (2001) 1 Lloyd's Rep. 147, the House of Lords held that the charterers or their representatives are in fact entitled to give such orders which the Master must follow unless there are valid reasons for not complying with those orders. Hence, the above clause essentially follows the principles laid down in the *Hill Harmony* so far as orders of employment are concerned. So far, so good.

As for the rest of it, it is, however, a fairly dangerous clause seen from the owners' point of view. There is, of course, nothing suspect *per se* in charterers' wish to monitor the vessel's performance. However, it is inconceivable that discrepancies between the reports submitted by the performance monitoring company and the ship's log will not occur simply because the information gathered by the performance monitoring company and the ship is collected from different sources. Consequently, the likely result of this clause may be that, although the vessel's log may contain the relevant information as to how the weather was at the particular

place at the material time, it will be information gathered from other sources which will prevail. Put in a different way, the result could be that the owners will be faced with a performance claim based on the calculations of the performance monitoring company even though the vessel may have performed within the warranties contained in the description in the contract, simply because parties have contractually agreed that the performance monitoring company will have the final say in the matter.

Deviation to safe life and property

It seems to have become more common to amend printed off-hire provisions to the effect that the vessel will be off-hire, also in case of deviation to save life. Whenever there is deviation to save or attempt to save property, it rarely causes problems because in most standard time charter contracts this question is dealt with in terms of sharing salvage remuneration.

The remuneration is usually handled in one of two ways: the vessel is off-hire during the salvage deviation and operation, but owners will be entitled to deduct expenses (which includes hire) prior to sharing the salvage remuneration or, the vessel remains on hire which means that the charterers deduct an amount equal to hire paid during the salvage operation etc. The latter is the manner in which this question is handled in clauses 9(b) and 14(c) of GENTIME.

Problems occur, however, if the contract stipulates that the vessel will be off-hire also when deviating to save or attempt to save life. There is no remuneration in monetary terms for saving life simply because it is deemed unethical and thus not possible to assess the value of human life in monetary terms in the present context. In principle time charterers, as the temporary "owners" of the ship, should defray the deviation as a matter of course, just as owners would have to absorb the costs if the ship was not employed in time charter. However, with the salient amendment it would still be the owners who would have to face the time and costs of deviating to save or attempt to save life.

This actually goes beyond many maritime codes containing reference to deviation to save life. Such deviation is invariably considered justified and, hence, it is not an infringement of the particular contract. For example, the following can be found in Section 4(4) of the United States Carriage of Goods by Sea Act (excerpt):

Any deviation in saving or attempting to save life or property at sea, … shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: …

In other words, it is embedded in law that the responsibility lies where it falls, i.e. within time charterers' sphere of risk and responsibility when the ship is employed in time charter, and within owners' risk and responsibility when the ship is not employed in time charter.

If nothing else, the aforementioned reflects common sense. Any other approach could result in an undesirable situation in which certain owners and Masters could feel inclined to ignore distress signals at sea. This could also happen when off-hire clauses are drafted to reflect that, irrespective of the fact that the ship is on time charter, it will nonetheless be the owners who must defray the time and cost in case of deviation for the purpose of saving life.

The cost element is, of course, secondary if life is at stake, but it is only just and equitable if

time charterers defray the consequences of such deviation. Particularly in the light of the fact that even if the contract may reflect that owners are to absorb the consequences of deviation to save life, provisions pertaining to sharing the benefits in the event of salvage of property are rarely amended.

Hence, off-hire clauses, which look something, like this:

If the vessel deviates en route contrary to the charterers' orders of employment, for any reason (whatsoever), the vessel is to be considered off-hire for the duration of such deviation

or

Any deviation contrary to time charterers' orders, including deviation to save life, is to be considered an off-hire event

should be rejected.

On-hire and off-hire survey provisions

A brief version of a typical clause could be something like this:

On-hire survey shall be on Charterers' time and off-hire survey on Owners' time.

This particular context concentrates on the time element, as costs are usually shared one way or another.

Although the aforementioned appears straightforward, the question arises: what if the vessel has not quite finished discharging prior to redelivery, i.e. the off-hire survey is commenced at a time when the vessel is in the last stages of discharging?

The answer is that such on-hire and off-hire survey provisions live a life of their own, unaffected by the off-hire provisions which may be contained in the contract. Hence, owners cannot argue that there is no off-hire if the vessel is still discharging.

The main issue here is that if there is a clause covering a specific situation and that situation occurs, then that specific clause will override clauses of a more general nature that could possibly have a bearing on the matter. Consequently, this provision would govern the question of time used for off-hire survey and, since it specifies that time used for off-hire survey, must be defrayed by the owners. As a result, charterers would be entitled to suspend time on hire from when the off-hire survey commences until it finishes, irrespective of whether time charterers may be using the ship for their purposes, i.e. discharging.

This being so, such clauses must also deal with the question of loss of time, if any. In the GENTIME (Clause 5), BIMCO's sub-committee decided to approach the question in a slightly different fashion. BIMCO's sub-committee felt that if the on-hire survey could be done without loss of time to the time charterers, hire should not be suspended during such on-hire survey. This follows from the provision reading

"[T]he on-hire survey shall be conducted without loss of time to the Charterers …"

Which states that the vessel is off-hire solely in the event the vessel is idle for the purpose of the on-hire survey. So far as off-hire survey is concerned, this is to be conducted in charterers' time.

Charterers to be liable for employment of "customary" pilotage

It is surprising how often BIMCO is asked to intervene in disputes rooted in provisions whereby time charterers are to pay for the employment of "customary" pilotage. This is a genuine dispute-breeder because it can be quite difficult, if not impossible, to assess whether it is in fact "customary" to employ pilot at the particular place. There is no objective yardstick to measure whether or not something may be "customary" unless, of course, everyone customarily does it.

Whereas it may be possible to establish "custom of the port" in terms of output or input of a particular commodity at the particular port, this cannot usually be done with regard to pilotage. The local pilots, of course, have a vested interest in confirming that it is "customary" to employ a pilot. The owners have similar interests if the Master has employed a pilot, whereas the time charterers obviously have a different view on this matter. Only in cases where the local pilots have an objective, certified, all-embracing list of ships containing information as to whether pilot was employed at the time, may some guidance on this issue be provided. BIMCO has yet to see such a list. This being so, clauses referring to "customary" pilotage should be avoided.

War clauses

As the events of September/October 2001 amply demonstrated, war clauses may suddenly become quite important. The main purpose of a war clause must be that the owners/Master are given tools to prevent the ship from having to enter a zone where the vessel might be damaged and her crew subjected to injury by war or war-like action.

This is achieved in CONWARTIME 1993, but there are other types of clauses which makes it more difficult for owners to refuse to order the ship into a potentially dangerous zone. For example, according to Clause 21 of Exxon's "STB Time", the charterers cannot order the vessel to enter, *inter alia*, a war zone without owners' consent, which is not to be unreasonably withheld. The clause subsequently defines in which circumstances the owners' consent is unreasonably withheld, namely:

"if insurance against all risks defined in (the preceding part of the clause) is then available commercially or under a Government program in respect of such voyage, route or port of loading or discharge."

As a result, the owners cannot refuse to order the ship into the particular zone if insurance is "available commercially".

Sometimes, Chamber of Shipping War Risks Clauses 1 and 2 are used in time charter parties. These clauses were designed for voyage chartering as suggested by the tenor of the clauses and include the words "freight", "fulfilment of the Contract" etc. and, as such, should never have found their way into time charter parties.

In addition, because they were drafted in the 1930's in connection with the Spanish Civil War,

they are now entirely inadequate and antiquated. For instance, ports are no longer blockaded in the fashion envisaged in these clauses. "Blockade" in the sense of the Chamber of Shipping War Risks Clauses means that the ship is not allowed to enter the port or area altogether. Blockade in this day and age is probably illustrated by the measures taken against Iraq under the auspices of the United Nations.

Another problem is that the owners will be unable to charge extra freight if deviating within the ambit of these clauses results in longer sailing, delay etc. Consequently, BIMCO withdrew its support for the use of Chamber of Shipping War Risks Clauses 1 and 2 many years ago.

There are also charter parties that contain no war clause at all i.e. the 1946 edition of the New York Produce Exchange charter party. While it is common nowadays to incorporate a war risks clause into the NYPE 1946, owners are better off by not having a war risk clause in the charter party than a bad and or inadequate war risk clause. In the absence of a war clause, owners may rely on the "safe port" warranty in the preamble.

Duration qualified by "about" & "without guarantee"

As a rule, owners want to know when they can expect to get their ship back. Preferably with as much notification as possible so as enable them to plan ahead and not get stuck with a spot or prompt ship on their hands. Whereas it may appear clear to every one at the time the contract is entered into, exactly what the period may be still, once the contents of the contract are scrutinised, owners may be in for a surprise.

It is probably the rule rather than the exception that a description of the period of hire is preceded by the word "about", for instance, "duration about 4 months". It is also quite common that the "without guarantee" qualification appears in this context, the duration thus described as follows "about 4 months WOG". Is there a difference between the two and if so what is the difference?

There is probably a difference, but the extent of the difference will depend on the circumstances of the particular case. The starting point is what margin may be implied by "about". Insofar as the word escapes exact definition, it cannot be defined in the abstract. Consequently, the particular case must be considered on its merits. Using the qualification implied by "about", the owners must expect that the vessel will be redelivered reasonably earlier or later than 4 months from delivery. If the "without guarantee" qualification also appear it will probably be very difficult for the owners to lodge a claim against the charterers, e.g. for a significant overlap. This is so because the words "without guarantee" are likely to be given their plain and natural meaning*.

Consequently, information given "without guarantee" is unlikely to have any repercussions against the party having submitted it unless the recipient can demonstrate that the information has not been given in good faith, i.e. there is a presumption that the information is given in good faith and based on the information available to the party at the time.

If, however, it can be shown subsequently that this was not the case, the "without guarantee" qualification will be of no use to the party having submitted the information. In which case, the party would be guilty of wilful misrepresentation. It cannot then rely on a qualification

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* *The* Lendoudis Evangels II *(1997) 1 Lloyd's Rep. 404*

in such case since it could then be said that it would benefit from its misrepresentation, which is inadmissible.

The "without guarantee" qualification comes in handy for time charterers if, for instance, a strike at a port delays the ship well beyond the estimated maximum duration. Owners have no claim if they cannot show that charterers knew from the outset that the trip would last much longer than given "without guarantee". Admittedly, this may also be the case if "without guarantee" is not employed. However, there may be circumstances where the owners may attempt to make the charterers liable for a substantial overlap if the period is not qualified by "without guarantee" whereas that qualification is a fairly potent cut-off provision once it is established that the charterers acted in good faith.

Clauses adding off-hire periods to period of hire and "last voyage" clauses

Whereas the above pertaining to "about" and "without guarantee" is likely to already affect the final period, it may be further affected if the contract contains provisions allowing the time charterers to add off-hire periods to the period of hire combined with a "last voyage" clause which will entitle the charterers to send the ship on a last voyage even if this will result in redelivery after expiry of the maximum period initially allowed under the contract.

Provisions whereby charterers are allowed to add off-hire periods to the period of hire as provisions should not necessarily be avoided, as it is a term that is tabled from the outset i.e. during chartering negotiations and owners can relate to it at that time. Whether or not time charterers will eventually exercise their option will, of course, depend on their ability to exploit the ship commercially at the material time. It may, perhaps, be a problem in the context of long-term time charter if there is a significant backlog, as it were, of off-hire. However, if there are provisions whereby time charterers are to give ample notification as to whether or not they will utilise their option, it is usually possible for the owners to take this into consideration when planning vessel's further employment on redelivery from the time charter.

Having said this, there may be a problem if the contract also contains a "last voyage" clause, the purpose of which is to exonerate the charterers if the ship is on a voyage which will not end until after the expiry of the maximum period of hire under the contract. The points to watch out for in this context are (a) whether "last voyage" includes a ballast voyage and (b) whether the clause will entitle the time charterers to order the ship upon a last voyage notwithstanding it can be ascertained that the voyage could not be completed within the time left under the period of hire.

In a "worst case" scenario, the **combined** effect of such provisions may possibly extend the period of hire considerably. The "last voyage" provision should, therefore, be worded so that there is no doubt that it must be a legitimate last voyage, i.e. a voyage which, when the time comes to perform it, it is reasonable to assume that the vessel will be able to complete it latest by the end of the period of employment in the absence of any unforeseen delays.

Approval by oil majors

A new breed of clauses has been introduced whereby the ship is to be approved by "the oil majors". The clause illustrated below may also serve as an example of a drafted clause to be avoided:

It is a condition precedent and Owners warrant that the vessel is not boycotted or is unpreferred

by any oil company or oil trader on her delivery to charterers. If the vessel during the currency of this Charter gets boycotted or becomes unpreferred/un- acceptable or any sub-Charterers/ Terminal/Supplier/Receiver through no fault of Charterers, and by reason of being boycotted or unpreferred/unacceptable loses time or gets waiting time, all such time to be considered off hire and expenses incurred in this connection to be for Owner's account. Owners further undertake to immediately take corrective measures to rectify matters.

First of all, it is not particularly well drafted. For example, the opening words reading, "It is a condition precedent" - in the context in which they appear the words are meaningless. Secondly, it makes it a **condition** that the vessel is not "boycotted" etc. However, at the end of the clause is requires owners to take corrective measures. Breach of a condition may allow the other party to terminate the contract. If, however, there is reference to remedial action to be taken, it will not be possible to apply that approach. Hence, the use of the term "condition" confuses the issue.

The vessel is, in principle, to be acceptable to "**any** oil company or oil trader". It is inconceivable that the ship can comply with this warranty. What does "unpreferred" mean? It may be difficult for the owners to obtain a statement from an "oil major" to the effect that the reason why the oil company preferred another ship is not that this ship is "unpreferred". Would this then allow the charterers to off-hire the ship in case of loss of time? All in all, the aforementioned clause certainly provides ample grounds for dispute.

There are probably clauses, which are better drafted and less onerous, but the fact remains that clauses of this nature may land the owners in serious trouble if, for one reason or another, an oil company falling within the category of "oil majors" (this could be another bone of contention!) for reasons of their own will not "approve" the ship as envisaged in such clauses and how could owners then take "corrective measures"?

Delivery of cargo without presentation of original bills or lading clauses

It is not uncommon that charter parties - voyage charters as well as time charter parties - contain provisions whereby the ship is to deliver the cargo although the original bills of lading are not presented at discharge port. An example could be the following:**

Notwithstanding the foregoing, Owners shall not be obliged to comply with any orders from Charterers to discharge all or part of the cargo

(i) …

(ii) without presentation of an original bill of lading

unless they have received from Charterers both written confirmation of such orders and an indemnity in a form acceptable to Owners.

Clauses of this nature are probably here to stay. So far as the oil trade is concerned, it is the rule rather than the exception that original bills of lading do not show up in time for presentation to the Master. Such clauses have developed into provisions recognising the two prominent features in this context:

*** Clause 13.(b) of "Shelltime 4"*

1. It is invariably the owners' problem if they agree to deliver cargo without production of the original bill of lading*** and,

2. The charterers' need to be able to deliver the cargo even if the original bill of lading is still somewhere in the banking chain.

The more elaborate and balanced of this type of clauses thus reflect the need for compliance with the owners' requirements in terms of a letter of indemnity (LOI). However, this does not affect the fact that such an LOI is no more than a **substitute** for proper P&I cover.

So long as it is a well-known major player in the market, owners may feel that they can comply with such requirements. However, clauses of this nature are potentially dangerous, not least when rudimentarily worded prescribing that the charterers will issue an LOI signed only by them and the particular charterer may not have assets which would enable them to face up to the financial challenges compliance with such an LOI may entail.

Assistance available

The BIMCO Services Department is the Secretariat's link with ship owners and operators, chartering brokers, port agents and P&I Clubs, as well as with Associate Members. At any stage of a transaction, guidance, recommendations and warnings are available to members. BIMCO can also assist members in collecting outstanding undisputed amounts. The Department can be contacted by telephone (+45) 44 36 68 00 or by e-mail: *services@bimco.org*

**** Per Lord Denning in Sze Hai Tong Bank v. Rambler Cycler Co. (1959) 2 Lloyd's Rep.*

"Without guarantee"

The use of the "without guarantee" qualification is nothing new. It is sometimes used for a particular purpose and sometimes because the ramifications may not be entirely clear to the party accepting it.

It should be kept in mind, however, that "without guarantee" is likely to be taken at face value, i.e. that "without guarantee" means just that; the information is given without any commitment and provided it is not deliberately false, it will be difficult to succeed in a claim against a party having submitted information "without guarantee".

The duration of time charter trips are often qualified by the salient qualification, for instance, "40-45 days without guarantee". If the trip lasts longer, owners may seek to lodge a claim in damages, particularly if the market is on its way up or if the vessel is cancelled for its next employment because of the prolonged duration.

The owners' problem is that they have to show that the time charterers knew at the time they submitted the duration "without guarantee" that the trip would last longer than 40-45 days. If, however, the owners are unable to lift their burden of proof, they will have no possibility to succeed in a claim against the charterers. In a London Arbitration rendered in 1990 the tribunal held, *inter alia* that

"The person using the phrase ("without guarantee") seeks expressly to divest himself of any

legal responsibility for the prediction made. Specifically, he seeks to say that if the prediction proves incorrect there is no remedy in law to be applied against him."

In the *Lipa* [2001] 2 Lloyd's Rep. 17, the time charterers sought to bring a claim against the owners claiming that the vessel consumed more fuel than warranted by the description provided by the owners. The vessel's consumption was qualified by "about" and in the description clause the final paragraph provided that

"All details 'about' - all details given in good faith but without guarantee."

The High Court concluded, *inter alia*, as follows:

"the last paragraph of (the description) clause explained the effect to be given to particulars about the vessel in the paragraph which were qualified by the word "about"; the qualification at the end of the paragraph was to be interpreted as adding a further stipulation that the "about" estimations had the status only of bona fide representations; and the charter did not contain a warranty about the vessel's rate of fuel consumption"

The effect was that since the charterers were unable to demonstrate that the owners had not made a good faith statement as to the vessel's fuel consumption, their claim failed.

One would assume, however, that there must be limits to how far the qualification can be expected to apply. If, for instance, the vessel is described as having three hatches/holds "without guarantee", it should be said that it is extremely doubtful that owners would actually be able to escape liability if the vessel is actually equipped with four or five hatches/holds.

Nevertheless, as may be gathered from the above, the "without guarantee" qualification works both ways and should be, in our opinion, approached with caution.

■ Cost of security guards

In view of the increased security requirements, notably in the United States, the Secretariat is fairly often confronted with the question of costs of security guards, which may be imposed by the local authorities because some crew members may be unable to obtain crew visas or, because the owners have resolved not to apply for crew visas.

It is sometimes argued that this question is dealt with within the ISPS convention. This is not, however, the case. There is nothing in the ISPS convention which requires that in the event that the crew is of a certain nationality, the ensuing costs of hiring security guards as may be required by the local authority must be defrayed by the owners.

Another argument put forward is that since the guards are ordered by the local authority because the crew either does not possess crew visas and/or is of a certain nationality, this is an owners' matter falling within, for instance, Clause 6 of the NYPE 93.

As far as BIMCO is concerned, the starting point must be that the vessel is in a contractual state and maintained in a fit and seaworthy condition. This implies, inter alia, that the vessel has on board a competent crew capable of coping with the duties and holding valid certificates

as may be required for the particular crew members to fulfil their respective tasks. The nationality of the crew was never a factor in deciding whether a particular crew member may be competent, and the fact that owners employ crew of certain nationalities cannot be relevant as long as the particular crew members discharge their duties in a competent and professional manner.

It should be kept in mind that ships are not immobilised because of the lack of visas or of crew being of a certain nationality. There are, however, restrictions imposed on the crew (which is a problem in itself), but since the vessel is allowed to work even if guards have to be employed and as long as the vessel is seaworthy, in a contractual state, the orders of the port that security guards should be employed must fall within the port expenses commonly to be defrayed by the time charterers.

Charter party advice on Danish Straits pilotage

Look first at your existing clauses before adding a rider

There have been more than 45 groundings of vessels passing through the Great Belt area of Denmark in the past 8 years. According to the Danish Maritime Authority none of the vessels involved had a pilot on board.

These statistics provide a clear picture of just how hazardous navigation in the narrow Danish Straits can be. While the Danish Authorities would like to see the introduction of compulsory pilotage in the Straits in order to reduce the risk of groundings and potential environmental damage, existing Treaties prevent such requirements being implemented. The International Maritime Organization (IMO) has tried to encourage use of pilots in these waters through Resolution MSC.138 (76), but it has no enforcement capability.

BIMCO is fully supportive of the IMO's initiative to give greater recognition to the need for pilotage in waters hazardous to navigation which would otherwise be compulsory were it not for existing treaties governing freedom of navigation.

While BIMCO is aware that a number of "Danish Straits Clauses" have begun to circulate in the market, our advice to members is that they should examine more closely the existing provisions of their charter parties before adding a rider clause. The basic charter party principle is that charterers pay for all pilotage under a time charter and owners pay for all pilotage under a voyage charter. The majority of standard form time charter parties contain clear provisions relating to the responsibility of the charterers to pay for all pilotage.

Time charter forms such as NYPE 46, NYPE 93, BPTIME 3 and SHELLTIME 4 all have provisions requiring the charterers to pay for pilotage. In the context of the charter party "pilotage" means all pilotage regardless of whether it is compulsory or not. Such wording will cover the use of pilots in the Danish Straits and payment by the charterers.

In agreeing a time charter party owners should avoid phrases such as "customary" or "compulsory" before "pilotage" as their inclusion may leave owners having to pay for non-compulsory pilotage. What constitutes "customary pilotage" is ill-defined and open to dispute, so should be avoided. If, as an owner, you are nevertheless obliged to accept such phrases then

you should try to negotiate the inclusion of the specific pilotage area, such as "the recommended pilotage between Skagen and Spodsbjerg (and vice versa). The phrase "whether compulsory or not" found in Clause 4 of BALTIME 39 is perfectly acceptable as it merely emphasises the general interpretation given to the term "pilotage" in this context.

In respect of voyage charter parties the general principle is that the owners will meet the cost of all pilotage and that, consequently, in the case of dry cargo vessels such "extra" costs need to be taken into account when negotiating the freight rate. In the case of tankers, such pilotage costs ought to be factored into the base rate set for tankers by Worldscale. Therefore there is no need for any additional wording to cover pilotage unless specifically required under a particular trade.

BIMCO is at the forefront of the development of standard charter party clauses and continues to provide timely, practical, clearly worded and balanced provisions for use by the whole industry. But we also believe in brevity. In this particular case, we believe that the creation of a rider clause is simply not necessary and the simple practical solution is to rely on the well-founded provisions of existing standard forms ensuring that wording relating to pilotage has not been modified.

The fact that the Danish Straits are not a compulsory pilotage area does not make navigation through them any less hazardous. BIMCO is of the view that it is in everyone's interest to treat the Danish Straits and, for that matter, the Bosporous Straits, as areas where it is prudent to employ a pilot.

Lien on cargo

Voyage chartering

Voyage charters commonly include a lien clause which gives shipowners a contractual right to exercise lien on cargo for unpaid freight, demurrage, general average contribution and other charges.

In the Voyage Chartering Section of this publication, the importance of linking cesser clauses with adequate lien clauses has been explained and owners were reminded to check before fixing whether lien in the particular country or port will be legally or practically (storage space for the cargo in question) possible.

Whereas in some countries the procedures in respect of exercising lien on cargo are fairly simple, experience has nevertheless shown that the procedures in many countries are of a more formal nature and may, in some cases, involve application to court with a request to order a lien, thus necessitating legal assistance.

It is therefore recommended that, whenever placing lien on cargo is contemplated, owners involve their P&I Club, which may then delegate the task of defending owners' interests to local representatives conversant with the prescribed procedure.

Time chartering

Keep in mind that clauses such as Clause 18 of the NYPE Charter (and parallel clauses in other time charter parties for dry cargo trade) reading:

> "That the owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter, including general average contributions, and the charterers to have a lien on the ship for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.
>
> Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel."

should not be taken at face value. The only situation in which owners can be certain to have the right to lien in the **rare cases** in which the cargo belongs to the time charterers and will have practically **no remedies** when the Bills of Lading are claused "freight prepaid". There is conflicting authority with regard to owners' right to exercise lien on cargo which does not belong to the time charterers and, similarly, there is conflicting authority whether owners may have the right to exercise lien on cargo for sub-hire under the "sub-freights" heading. Indeed, the more recent judgments in this context suggest that "sub-freights" does not encompass "sub-hire".

In the Time Chartering chapter of this publication, access to other remedies such as arresting voyage freight, temporary suspension of services, etc. has already been covered.

For the benefit of members, the BIMCO Secretariat has collected, and endeavours to update, information on the possibilities of placing lien in different countries. In spite of these efforts,

it has not been possible to induce all the addressees to respond to our enquiries and, hence, the list of countries where the actual position is known is far from complete.

So far, information has been obtained from the following countries:

Algeria
Angola
Antigua
Argentina
Aruba
Australia
Azores
Bahamas
Bahrain
Bangladesh
Barbados
Belgium
Belize
Benin
Bermuda
Brazil
Bulgaria
Cameroon
Canada
Cayman Islands
Channel Islands
Chile
China
China - islands of Kinmen, Matsu, Penghu & Taiwan
Colombia
Congo
Congo, Democratic Rep. of
Croatia
Cuba
Cyprus
Djibouti
Dominican Republic
Egypt
Estonia
Finland
France
Gambia
Georgia
Germany
Ghana
Greece
Guatemala
Guyana
Haiti
Honduras
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Ivory Coast
Jordan
Kenya
Korea, D. P. R. of
Korea, Republic of
Kuwait
Lebanon
Libya
Madagascar
Malaysia
Maldives
Malta
Martinique
Mauritius
Mexico
Morocco
Mozambique
Namibia
The Netherlands
Netherlands Antilles
New Zealand
Nicaragua
Nigeria
Oman, Sultanate of
Pakistan
Panama
Peru
The Philippines
Poland
Portugal
Puerto Rico
Qatar
Reunion
Romania
St. Helena
Sao Tomé
Saudi Arabia
Senegal
Seychelles
Sierra Leone
Singapore
Slovenia
Solomon Islands
South Africa
Spain
Sri Lanka
Sudan
Surinam
Syria
Tahiti
Tanzania
Thailand
Trinidad & Tobago
Tunisia
Turkey
Ukraine
United Arab Emirates
Venezuela
Vietnam
Yemen, Republic of
Yugoslavia

Algeria

"1. At Law
The right to place a lien on cargo with a view to obtaining payment of freight exists and is even provided for under Article 792 of the Algerian Maritime Code (Ordonnance No. 76-80 of 23 October, 1976) which States:

> 'The transporter may refuse to deliver the goods and to consign them until the consignee has paid or has provided a guarantee for all that is owed for the transport of the goods, as well as for contribution towards general average and remuneration for assistance.'

The order of events is as follows:

The transporter (or his representative) first of all applies for the consignment of the goods, and the president of the court designates the consignee and establishes the condition and duration of the guarantee. At the end of this period, the transporter applies for the sale of those goods necessary to cover payment of his freight.

This legislation applies throughout the country and applies to all Algerian ports.

2. In Practice
We must regretfully inform you that it is rather difficult in practice to place a lien. This is partly due to congestion at Algerian ports and particularly at Skikda, and partly due to a lack of warehouses where the cargo may be stored."

Angola

"Please note that there is no possibility of placing lien on cargo in Angola."

Antigua

"Legally it is possible exercise lien on undelivered cargo in Antigua and Barbuda for unpaid freight, demurrage or damages for detention. All undelivered cargo remains in storage at the Port until released to Consignee.

The question of practical possibility depends heavily on when the lien is to be exercised. Generally, cargo that is in storage for more than 3 months at the Port goes up for Public Auction.

There is little or no difference in the situation if the cargo owner/receiver is state owned or privately owned. What makes a real difference is how the cargo is consigned."

Argentina

"We would report as follows:

1. In our country the carrier is legally authorised to request a lien on the cargo carried in his ships with Argentine ports as destination, in guarantee of his credits for unpaid freight and/or

damage sustained as a consequence of delays by the consignees in withdrawing the merchandise. The same hypothesis should be contemplated in cases of damage produced by some goods to other goods carried in a ship or to the vessel itself.

2. Once the lien is judicially placed, customs (Administración Nacional de Aduanas) are notified, and do not allow the goods to leave the Port Jurisdiction unless they receive the order from the very same Judge who issued the decree, authorising the release of the lien so that the goods may be cleared through customs. This authorisation may be replaced (and this is what generally happens in practice) by the express agreement of the carrier and/or his local maritime agents who, in this way, show that the credit for which the lien was placed has been settled;

3. Regarding the practical possibility of exercising said measure (a lien on the cargo), it is usual to analyse its convenience taking into account the special features and circumstances of each case. In this sense, and just as an example, the following hypotheses can be analysed:

a) That the goods on which the lien has to be placed are of the 'perishable' kind. In this case the lien must be petitioned immediately the ship arrives and, in view of the characteristics of the goods, their auction must also be requested to prevent their losing their value by the simple passage of time;

b) If the goods are not 'perishable', an attempt should be made to stow them (as far as is possible) in port warehouses which ensures their integrity, avoiding damage or losses which would decrease their value. However, taking into account that the passage of time may also effect this guarantee (for the credits of greater right originating in the port rates and duties, warehouses expenses, etc.), in each case the policy to be followed must be analysed and, if necessary, the auction of the goods must be requested;

c) If the merchandise is not 'perishable' but, due to its size and/or characteristics, it cannot be entered into a fiscal warehouse to be kept under custody, all necessary precautions must be taken to protect it - out in the open - where it is stowed under lien and, should it be convenient, its judicial sale should be requested.

4. In all the aforementioned hypotheses, both the lien and the auction are carried out with the intervention of the Courts of Justice, the intervention of which is compulsory legally. Nevertheless, it should be made clear that, due to our experience in similar cases, the sale of the goods is usually an extreme measure which in the majority of cases does not show positive results because of the expenses which - as a rule - have to be settled before the carrier's credit (for example: legal expenses, credits of the Port Authority for rates, duties, warehouse, etc.)."

Aruba

"It is legally and in practice to exercise lien on cargo in the Oranjestad port for unpaid freight and/or demurrage or damages for detention.

There is no difference in the situation when the cargo owner/receiver is a state-owned company and not a private company."

Australia

"1. There is no legal problem in placing a particular contractual lien on cargoes or documents under Bills of Lading/charter parties, in order to recover unpaid freight, demurrage or detentions damages.

2. There is no difference in the position where a Government/State owned party is involved.

3. The lien would be applied by denying delivery of the cargo from terminals, depots or warehouses, where generally, the cargo is under the control of the local customs authorities.

4. There usually is adequate storage space available for up to one year, by transferring the cargo under customs permission to 'Customs Bonded' storage areas, where the cargo will be held, still under customs control, at cargo owners' cost.

5. It should be noted however that where customs decide that any cargo is illegally or improperly imported and they decide to seize the cargo, the shipowners' lien is lost, as the customs do not recognise such lien. The shipowner will thereupon need to take other action for recovery of any amounts due to him.

6. A lien may be placed on current shipments for unpaid charges on previous cargo, if it is the same party."

Azores

"In respect of your enquiry we are pleased to inform you that although it is legally possible to exercise a lien on cargo, it is in reality infeasible as, Customs or Port Authority storage facilities are almost non-existent. This being so, the only place that could be used is the vessel itself, which could give rise to demurrage disputes. This situation applies both to state-owned and private companies."

Bahamas

"With regard to your question, we advise that it is possible legally to place lien on cargo in the Bahamas. The problem, however, is with storage. There is open storage at Freeport Harbour and approximately 30,000 sq. ft. of secured warehouse space. No storage barges available."

Bahrain

"It is possible to exercise a lien on cargo under the law of Bahrain. The normal procedure is to apply to the Court of Summary Causes for an ex parte order. When the order is issued the Public Security is instructed to place a lien on the assets. It is then necessary to file a case in the Civil Court within seven days of the issue of the ex parte order. The fact that cargo may be in the port area does not give it any legal immunity from the order placing a lien over it."

Bangladesh

"The Chittagong Port Authority acknowledges lien in accordance with the CPA Act Ordi-

nance 1976. The relevant clause of the Act is as follows:

> 'Clause 22. The owners' lien on freight - (i) If the Master or owner of any vessel, at or before the time of landing from such vessel of any goods at any dock or pier, gives to the Authority notice in writing that such goods are to remain subject to a lien for freight, primate for average of any amount to be mentioned in such notice, such goods shall continue to be liable after the landing thereof, to such lien.
> (ii) Such goods shall be retained either in the warehouse or sheds of the Authority or with the consent of the Collector of Customs, in a public warehouse, at the risk and expense of the owner of the same goods, until the lien is discharged as hereinafter mentioned.
>
> Clause 23. Discharge of shipowners' lien for freight - Upon the production to any officer appointed by the Authority in that behalf of a document purporting to be a receipt for or a release from, the amount of such lien, executed by the person by or on whose behalf such notice has been given, the Authority may permit such goods to be removed without regard to such lien.'

According to the above, lien is exercisable by the Master or the owner of any vessel. Of course it becomes a problem when a large consignment is concerned as for example a shipload of grain, fertiliser or any other item which may be difficult to store because of shortage of space. As a matter of fact the sheds in Chittagong port always remain congested hence large quantities of cargoes cannot be kept within the port area. There is the provision that with the consent of the Collector of Customs cargo may be stored in public warehouses. Similarly cargo may also be kept at hired coasters or barges if the owner is prepared to pay the expenses."

Barbados

"We wish to advise that our enquiries as to whether it is legally possible to exercise a lien on cargo in the Bridgetown port, have not been clearly answered, and there is some doubt as to whether this is possible.

There have been cases in Barbados where steamship lines have been able, through their local agents, to withhold delivery of cargo for one reason or another. However, this is normally limited to a period of one month, after which the port authority has the right to dispose of the goods by sale at public auction; the proceeds of which all go to the authority.

The question of storage space must also be taken into consideration, for should the law allow the right to a lien, there is very limited warehousing space outside of the port where cargo may be stored."

Belgium

"Please note that the notion of the lien does not exist in the Belgian maritime legislation.

Art. 116 of the Belgian maritime law provides that the Captain has the right to apply to the Chairman of the Court of Commerce to obtain the designation of a trustee for the cargo on board in case the freight is not paid. The trustee will keep the goods under sequester until the time the freight has been paid.

Art. 125 of the same law grants a privilege to the Captain on the goods carried for the freight and the contribution to the average during a period of 15 days after the delivery of the cargo provided it has not been transferred to thirds. This privilege does not extend to demurrage or damage for detention of vessels.

To our knowledge there is no problem of storage space for accommodating sequestrated goods in Belgian ports. There is no difference in the procedure to have goods placed in hand of a trustee whether the receiver is a state-owned company or a private firm."

Belize

"Yes, it is legally possible to exercise a lien on cargo in the port of Belize for unpaid freight and/or demurrage or costs for excess storage.

Yes, there is storage space ashore in the customs compound. Excess storage is charged in accordance with the port tariff. There is no difference in the situation if the cargo owner/ receiver is a state-owned company."

Benin

"We refer to your letter on above mentioned matter to confirm to you that our country ratified all trading conventions and respects also all kind of contact between different parties. Therefore "Lien on Cargo" is possible in Benin. But no place is available to store such a cargo and the party requiring the lien is responsible for the payment of all charges caused by possible long stay"

Bermuda

"It is legally possible to affecting a lien, Bermuda being governed by British Law, however there are only very limited facilities in Bermuda. Therefore, except for perhaps small consignments of cargo, it would be impossible to store and secure cargo in the Hamilton port area."

Brazil

"Brazilian law prohibits the retention of the merchandise on board ship, for unpaid freight or demurrage. However, when the freight is not paid, it allows the owner to order the retention of the goods in the warehouses, until the debt is settled. Although the law is not very clear, we understand that the measure has to be taken within thirty days of the discharge of the cargo.

The law does not mention specifically the demurrage. But there are precedents permitting the retention of the goods in the warehouses, due to unpaid demurrage, although the courts do not always decide in the same way on this matter. We understand that the doubt derives not only from the discussed nature of the demurrage - extension of the freight, or indemnity for damages - but also from the uncertainty of the debt, since there might be many ways of counting the days of the demurrage. However, the matter seldom goes to the courts.

It must be noted that when there occurs abandon of the goods, recent laws enable the State to

confiscate and sell the merchandise, and collect the money, leaving the owner unable to enforce the guarantee that is represented by the merchandise, but that becomes useless in this case."

Bulgaria

"It is legally possible to exercise lien on cargo for unpaid freight and demurrage in Bulgaria. According to Article 158 of the Bulgarian Merchant Shipping Code, the carrier may retain cargo until payment of sums set out in Article 157 have been paid or appropriate security has been put up. The sums referred to in Article 157 are freight or balance thereof, demurrage as well as expenses for the cargo incurred by the carrier.

Article 159 prescribes the guidelines for placing the cargo into custody including the carrier's right to sell the cargo in the event of non-payment. Article 160 of the Bulgarian Merchant Shipping Code, the carrier has preferential right to the value of cargo sold at auction within the ambit of Article 159.

As far as we know, small quantities of bulk cargoes can be kept in custody by Port Authorities if so ordered by the Court. There is no difference whether it is a private or state-owned company."

Cameroon

"Legally it is possible to exercise a lien on cargo but we do not think this really practical as we are facing some storage problems.

In fact cargo discharging in Douala is free of storage for 10 days, then storage fees are extremely high and after four months cargo can be sold by customs at public auction. There are possibilities of stocking cargo outside ports, in bonded warehouses, but then it must be customs cleared from port (special customs formalities being necessary to put cargo in bonded stores), but then original Bill of Lading or bank indemnity must be surrendered by consignee or forwarding agent and this might create a conflict with lien party itself. Moreover independent storage can only be organised for bagged and general cargo.

As for bulk and liquid, only storage possibilities are with receivers themselves thus lien on cargo not applicable. Considering the above, we suggest that your members avoid to take lien on cargo in Douala for time being."

Canada

"Under Canadian law, a shipowner who has not extended credit is entitled to retain possession of goods until he has been paid what is owing to him. If he places the goods in the hands of a warehouseman or wharfinger, Section 597 of the Canada Shipping Act permits him to retain his lien for freight and other charges by giving the warehouseman or wharfinger notice in writing that the goods are to remain subject to that lien.

Lack of storage space would not usually be a problem at ports where general cargo is handled. In some ports devoted exclusively to the handling of bulk cargo, however, the storage areas may be owned or operated by the receiver himself and enforcement of the lien would not, therefore, be feasible.

A lien cannot be exercised against cargo owned by the Government of Canada or any Canadian province. The same immunity does not, however, extend to goods belonging to foreign governments, when the latter are engaged in commercial activities, nor as a general rule to cargo belonging to state-owned corporations, whether Canadian or foreign."

Cayman Islands

"**1.** Where the agent of a ship from which any goods have been landed at a port and accepted by the Authority for carriage or storage or for delivery to the consignee, notifies the Director in writing that the freight or other charges payable to the agent of the ship to the amount specified in the notice, remain unpaid in respect of the goods, the Director shall retain the goods and refuse delivery of them to the consignee or any other person until:
(a) The payment of any dues and charges in respect of such ship and the goods and customs duties thereon;
(b) The production of a receipt for, or a release from, the payment of such amount signed, or purporting to be signed by or on behalf of the agent; or
(c) The payment of such amount by the person entitled to take delivery thereof.

2. Where the Director causes to be delivered any goods in respect of which a notice has been given under subsection 1. to a person producing such receipt or release, or making such payment as is referred to in paragraphs (b) or (c) thereof, the Authority shall be freed from all liability to any person in respect of the goods."

Channel Islands

"We can of course only speak for Jersey, but we expect that the situation will be much the same in Guernsey. In our opinion there is no theoretical reason why the right of lien should not be exercised over a cargo in a Jersey port provided that the plaintiff in the action has a proprietary interest in the goods (which strictly speaking will always be the case when claiming a lien) or that the Court otherwise has jurisdiction to entertain the plaintiff's claim.

The practical problem is the availability of storage space. We are not aware that the Viscount has, at his disposal, storage space that would be adequate for any but the smallest of cargoes. In the circumstances it is therefore unlikely, from a purely practical point of view, that it will be possible to exercise the right of lien unless the claimant is able to provide adequate secure warehousing."

Chile

"We can confirm that it is legally possible to exercise lien on cargo in Chilean ports for unpaid freights and/or demurrages and damages for detention. Shipowners may even sell part of the cargo to cover pending freights and others mentioned. The condition is that this lien be effected within 30 days since the discharge was finished.

Unfortunately the red tape inherent to this type of legal action is long and complex which in practice makes the procedure difficult, specially considering that customs agents are not forced, legally, to obtain the corresponding 'release' of the cargo from ships agents. Having the original Bills of Lading in their hands is enough to withdraw the goods from custom warehouses.

As regards storage space, we see no problem there except, of course, in the case of bulk cargoes, although the main obstacle to place a lien in the port is that - considering that the cargoes can be withdrawn without the consent of the ship agent - one would have to assume that the freight (or other charges) would not be paid and prove same to obtain the lien prior to the discharge".

China

"At your request, we would like to inform you of the legal statutes with regard to this issue and practice on this subject as follows:

In accordance with Chinese laws, carriers shall be entitled to place a lien on cargo when payment of the claimed amount has not been made by the parties concerned. For instance, a carrier can have a lien on cargo when a shipper or consignee refuses or fails:

1. To pay freight, deadfreight, demurrage or any other amount payable;

2. To pay contribution in case of General Average;

3. To provide adequate security.

Meanwhile, based on the Rules of Civil Procedure, 'The Court' shall make a verdict on providing security at the plaintiff's application or within its own legal power when it deems impossible or too difficult to exercise the judgement due to the behaviour of the parties concerned or other reasons.

'The measures of obtaining security include distraining or freezing the property, demanding guarantee or any other means allowed by laws. In terms of the property distrained or frozen which is not suitable for a long-term preservation, the Court shall have the right to sell it by auction and preserve the cost for execution.'

According to the above statutes, the possibility of placing a lien on cargo in China is absolute, although occasionally there is no storage space where the cargo could be placed into custody when such a case occurs and there has been such a case in practice in which the judgement was favourable to the carriers."

China - the islands of Kinmen, Matsu, Penghu and Taiwan

"To exercise lien on cargo is legally practicable in accordance with Civil Act and Marine Law. However we would make the following comments:

1. Can only place lien on cargo or part of cargo to the value of claim, i.e. not exceeding the amount of unpaid freight and/or charges.

2. A court order should be obtained for which a pro forma bond equal to one third, two thirds or the full amount of the claim to be lodged depending on the adjudgement/decision of the court.

3. For freight collect cargo, the carriers' agents can in fact hold the issuance of Delivery

Order until whole freight and charges have been paid, as customs authority here would only release cargo against the carriers' agents' Delivery Order and not the original B/L that consignee holds.

4. The carriers' agents can not refuse to issue Delivery Order/release cargo on a prepaid B/L. To exercise lien on cargo, a court order must be or can only be obtained on the reasons other than unpaid freight or charges, e.g. misdeclaration of goods, breaching contract, etc.

5. The customs authority has the priority to the proceeds of auction of the cargo for their duty, storage charge, etc.

6. In our experience where undelivered cargo is auctioned by the customs, there has invariably been insufficient funds realised to leave any proceeds to meet unpaid freight and demurrage claims, after the prior charges such as customs duties and storage have been met.

As to the question of what happens in practice, should a lien be placed, the cargo can then remain in the carriers' contracted terminal in the case of container shipment, or in the port authority in the case of B/B cargo. Storage charges are for cargo's account."

Colombia

"**1.** Cargo can be retained by the agent by means of a letter addressed to the customs authorities, whenever either the freight has not been paid or a contribution to general average has not been arranged. This is the normal retention, and owners can be quite sure that their cargo is not going to be delivered to the local consignee as long as he does not authorise same.

2. For any other claim such as deadfreight, demurrage, deviation or any other charge, a customs retention is not possible in Colombia. For cases like the above it is necessary to take legal action against the Colombian consignee and it is necessary to demonstrate to the corresponding judge that a breach of contract has taken place and request him to order an embargo of the cargo.

We would like to mention that such legal action is quite time-consuming as the judge requests a translation in Spanish of the different contracts, and if we mention that a translation of a charter party takes about 6 months, you will realise that such an action is not very effective.

It should therefore be recommended to owners that if they have a substantial claim for one of the reasons listed under point B) they should know, that if dealing with Colombian parties unknown to them, a guarantee should be requested in advance from such charterers before the vessel enters into the Colombian port (for instance in case of demurrage at loading port).

We think it is also interesting to you that once a vessel is cleared and declared in free pratique, the unloading cannot legally be interrupted as otherwise heavy fines will be imposed on the vessel for the corresponding 'shortlanding'."

Congo

"We wish to confirm that it is legally possible to exercise lien on cargo for any specific rea-

sons. The only exception we would make is for cargo belonging to the State companies, for which we actually cannot say in advance how it would work out.

We have been having, in the past, quite some cases with either Administration or even direct with the Presidency, and some of these cases have proved that we can sometimes be compelled to deliver cargoes even if there is freight or anything to be paid prior delivery.

We can also confirm possibility of storage for cargo under lien; however we wish to remind you that after 11 days (free period of storage in our sheds) cargo has so far to be moved to the 'depot des Douanes' i.e. 'customs depot' cargo being still under our supervision, storage fees-wise; then after say two months, Customs and Excise has the full liberty to start public auction."

Congo, Democratic Republic of

"We confirm that it is legally and in practice possible to exercise lien on cargo in ports of the Democratic Republic of the Congo. The seizure can be done as far as:

- It is granted by the judge;

- Documents presented evidence that the claim is valid, payable and unquestionable.

There is theoretically no difference between the status of private and state owned companies in this respect. However, in practice there can be a difference."

Croatia

"Please note that in Croatian ports it is possible to exercise lien on cargo ashore (not in barges because same are not available) for unpaid freight and/or demurrage or damages for detention. However, for some particular commodities especially cargo in bulk such as ores, minerals, grain and oleiferous seeds it can be difficult to place them in custody because of possible scarcity of necessary storage space."

Cuba

"In Cuba it is legally possible to exercise lien on cargo in Cuban ports for unpaid freight and/or demurrage or damage for detention. In practice, although allowed by law, it would prove very ineffective placing any lien on cargo as there is no storage space whatever which could be used.

Storage space is one of the problems confronted by Cuban State importers. All the State importing companies are very short of warehousing facilities resulting in cases where goods cannot be removed from incoming docks (creating serious problems) and in other cases having to send cargoes directly from ship to a number of State consumers all over the island.

Furthermore, if cargo lien is exercised, cargo must be retained at port warehouses and storage costs must be for account of the party having ordered the lien. Normally court procedures may take long time and storage costs could thus be very high. Additionally, in order to safeguard

the cargo retained to avoid pilferage or other loss or damage, custody must be appointed and this is far more expensive than storage costs.

If cargo remains in port in excess of thirty days there is the possibility that customs can declare the cargo abandoned and seize it.""

Cyprus

"Both the shipowners' lien for freight under common law as well as the lien expressly given for demurrages by the contract of carriage are recognised under Cyprus Law.

Furthermore, Section 494 of the English Merchant Shipping Act 1894 which gives the right to the shipowner to land and warehouse goods under notice of lien for 'freight and other charges' applies in Cyprus.

However, although private bonded warehouses usually accept a notice of lien given as above, and abide by it, the Cyprus Ports Authority (in cases where the cargo is placed in customs warehouses) refuses to accept such notice or abide by it unless they receive a court order to that effect.

In order to summarise the position in Cyprus, we may say that although it is legally possible to exercise a lien on cargo for freight, demurrage and other charges, in practice this can be done only if the said cargo is stored in private bonded warehouses."

Djibouti

"We confirm there is a possibility - through a lawyer - to place a lien on cargo in Djibouti. Pending type, volume, weight of cargo, same can be transferred outside port in a safe place, but subject to customs formalities, since cargo will move out of port. Cargo can also remain in port and will be subject to storage charges.

There may possibly be problems attempting to lien state-owned cargo"

Dominican Republic

"Placing a lien on the cargo in the Dominican Republic is more a factual than a legal matter. Our codes have not been updated in relation to contemporary maritime codes, and basically our Commercial Code is similar to the original Napoleonic Code of the 19th century. As you may be aware, all cargo is discharged into the custody of the Customs authorities, who are responsible for the proper release of cargo to the holders of the Original bills of Ladings.

In practice, the fact that the containers remain in the physical custody of the privately controlled Container Terminal allows for better possibility of actually exercising a lien on FCL cargo. Legal notification of the court order to the Terminal Operator will ensure that the cargo is not physically delivered to the consignee.

However, it is not the same with bulk and breakbulk cargoes, because this cargo is, for the most part, stored in sheds controlled by the Port Authority or taken away directly by trucks

during the discharging. In the public warehouses, even pilferage is a serious problem for many types of cargoes, so you can imagine how effective a lien will result.

Finally, the right of lien on cargo, in theory applies the same both for cargo consigned to state entities and private companies, although in practice it is much more difficult to enforce it against certain government organizations."

Ecuador

"From a practical, commercial and legal point of view it is possible to exercise lien on cargo in Ecuador. There is no difference whether it is a state owned or private company. The ports of Esmeraldas, Guayaquil and Puerto Bolivar have sufficient sheds and open space available (January, 2005). No storage in barges.

The shipping agency instructs the operator of the storage space not to release it until authorised by the ship owners."

Egypt

"In reply, we quote hereunder, for your kind information, a free translation of the articles of the Egyptian Laws relating to this subject:

> **'Art. 125 of Maritime Law**
> The Master should not retain the goods on account of the non-payment of freight or general average and expenses, but he may ask for the cargo to be placed in the custody of a third party other than its owners until the amount due to him is settled. If the cargo is perishable he may ask for its sale, unless the consignee offers a surety for payment. In case there is a general average which cannot be distributed immediately, he may ask for depositing an amount to be estimated by the Judge or an approved surety to be offered.'
>
> **'Art. 246 of Civil Code**
> A person who is under an obligation to supply something may refrain from performing his obligation so long as his creditor does not offer to perform an obligation incumbent on him arising out of the obligation of the debtor and connected therewith, or as long as the creditor does not supply adequate security to guarantee the performance of his obligation. This right belongs especially to the possessor or holder of a thing, if he has incurred expenditure of a necessary or useful kind on the thing. The possessor or holder may, in such a case, refuse to return the thing until he has been repaid the amount due to him, unless the obligation of restitution results from an unlawful act.'"

Estonia

"According to Estonian legislation there is legal and practical possibility to place lien on cargo in Estonia."

Finland

"According to the Finnish Maritime Code it is legally possible to exercise lien on cargo for

unpaid freight and demurrage. It is also possible in practice as there is enough vacant storage space in the Finnish harbours."

France

"Following your today's fax we confirm that it is possible to place a lien on cargo in France for non payment of freight or demurrage. Procedure is quick and simple in the local commercial court.

In France it shouldn't be difficult a priori to seize in the premises of the holder of the goods (in the warehouse of the person who claims to be the goods' owner). There is no difference in law between a state-owned company and a private company. Goods which belong directly to the State are a matter for administrative courts instead of commercial court".

Gambia

"We would inform you that it is legally possible to exercise lien on cargo at Banjul. The practicability of this in terms of storage space should, however, be investigated.

There would be no difference should the cargo's consignee be a state owned corporation."

Georgia

"In accordance with Georgian maritime Code maritime lien can be placed in Georgia. For this purpose there are corresponding Articles 14 (h), 25, 26, 27, 43, 84 and 85 in the Maritime Code. These articles stipulate that maritime lien can be placed against the claimant's application to the Harbour Master, and the Harbour Master detains either the vessel or the cargo for 72 hours. A Court's or arbitrage's resolution must be submitted within these 72 hours.

In this case the right of the place of agreement applies or the resolution of the arbitrage, which is stated in the Agreement. A resolution of a foreign arbitrage has legal force in Georgia.
As concerning the practical possibility - in principle the storage in the port or terminal under the supervision of the customs is possible, but this service is paid and it depends on the volume and the kind of the cargo".

Germany

"The legal situation according to German law can be described as follows:

1. By accepting the cargo the consignee incurs the obligation to pay:
a) freight
b) demurrage
c) customs duties and other expenses

if so provided for in the freight contract or the Bill of Lading. Otherwise the carrier is entitled to retain the cargo. In addition he has a lien on the cargo in respect of the above-mentioned claims. The lien continues as long as the cargo is retained or deposited. The carrier does not need any storage space because the lien continues even after delivery, provided that it is judi-

cially asserted within thirty days from the completion of delivery and the cargo is still in the possession of the consignee. He has to sue for recovery of the cargo or (better) for execution against the cargo.

2. There is no difference as to whether the cargo owner/receiver is a state-owned or a private company."

Ghana

"We confirm that it is possible to exercise lien on cargo pending payment of freight/charges by refusing delivery to consignees. All such goods are kept within the port security area. However, such goods cannot stay in port indefinitely and could eventually be auctioned by customs/port authority.

There is no difference in the situation if the cargo owner/receiver is a state-owned company or private."

Greece

"With regard to your enquiry we quote below for your easy reference the official translation into English of relevant provisions 205-209 of the Greek Code of Private Maritime Law (Law No. 3816/1958) on maritime liens attaching on the ship and freight.

These provisions are fully complied with in practice and irrespective as to whether the cargo owner/receiver is a state-owned company or a private company. Moreover, to our knowledge, there are no problems of enforcement of liens due to non-availability of storage space.

The four ranks of maritime liens under Greek law in fact virtually coincide with the first four ranks of maritime liens as per Article 2 Paragraph 1-4 of the 1926 International Convention of Brussels on Maritime Liens leaving aside the fifth rank of maritime liens of the above Convention, namely 'claims resulting from contracts entered into or acts done by the Master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the Master is or is not at the same time owner of the vessel, and whether the claim is his own or that of ship-chandlers, repairers, lenders, or other contractual creditors'. It is noteworthy that Greece has not ratified the above Convention.

With regard to your question as to whether it is possible to exercise lien on cargo for demurrage or damages for detention, please note that it is not possible to exercise a lien on unpaid sums due to the owner (carrier) for demurrage or damages for detention due to failure to take delivery of cargo. According to the Greek Code of Private Maritime Law (Articles 119, 131, 149) these sums constitute 'an additional remuneration' and are not equivalent or tantamount to freight.

> **'Section 205**
> Only the following claims and in the following rank give right to a maritime lien attaching on the ship and the freight:
>
> **a)** Legal costs incurred in the common interest of the creditors, dues and charges to

which the ship is subject, the taxes relevant to the navigation as well as the expenses for the ship's custody and maintenance as from the ship's arrival at the last port.

b) Claims arising from the contract of employment of Master and crew as well as the contributions due to the Seamen's Pension Fund accruing from the employment of the crew.

c) Expenses and awards arising from maritime assistance and salvage.

d) Indemnities due to ships, passengers or cargo by reason of collision of ships.
Maritime Liens rank in priority over the claim of hypothecation.

Section 206
Privileged claims of the same rank are rateably satisfied. In the case of several claims arising from maritime assistance and salvage, the latter claims have precedence over prior claims.

Section 208
Besides the reasons for extinction provided for by the Civil Code, the lien is extinguished by public sale of the ship.

Section 209
The lien cannot be enforced against the insurance indemnity.'"

Guatemala

"Possibility of placing lien on cargo for unpaid freight and/or demurrage or damages for detention:

If the goods are invoiced on a c.i.f. or c.f. basis and the consignee has settled, any demurrage or non-payment is the responsibility of the shipper and no lien could be placed on the goods.

If freight is not included in the price of the goods then an embargo is both possible and feasible if the following minimum requirements are met: a) the existence of a written transport contract, b) that this contract should establish and regulate the rights of the carrier in the event of any default by the consignee, and c) the existence of a legal representative (Power of Attorney) who could appear at the hearing in the name of the carrier. It is feasible because there is warehousing space for cargo which has been embargoed, although there is of course a charge for such storage.

There is a difference if the owner/consignee of the cargo is a Government agency because goods belonging to the State cannot be embargoed and in practice it is judged that goods belong to the State as soon as a tender is accepted or as soon as the contract is signed. This rule applies to the Central Government and to autonomous or decentralised entities.

The above is a very general reply and there could be variations in individual cases."

Guyana

"In response to your enquiry we should like to advise you that liens are often exercised on

cargo in our port and no delivery is effected until the lien is satisfied. If for some reason, the cargo is being sold by the customs authorities, such lien is advertised and provision made for settlement after customs claims have been fulfilled. State-owned entities operate in this country under the same laws as private sector."

Haiti

"Goods in Haiti are delivered by Customs not by Carriers. They remain in Port Authority or Terminal Warehouses until cleared for delivery. We have had in the past full co-operation from Customs when we requested goods not to be delivered until freight payment but this was just a service rendered by Customs, not a legal lien.

The lien could in fact be placed upon the goods but it has to be made rapidly before the receivers take delivery, which takes 2-3 weeks - sometimes more, and justice is often slow. The fact therefore is, as there is no bonded warehouse or any kind of storage place than those cited, lien can be successfully accomplished depending on the lawyers speed in doing so. Then there will be no problem in having Customs holding goods until release."

Honduras

"Cargo imported into Honduras is discharged from vessels in port into the custody of the Empresa Nacional Portuaria (from containers or trailers at inland points into customs warehouses) whence goods are delivered to consignee upon completion of the necessary customs procedures.

Normally customs respond to requests from agents to hold goods until freight has been paid (always assuming that Bill of Lading is clearly marked 'Freight Collect'), but there does exist in Honduras a legal way of the consignee obtaining possession of the goods (by means of a provisional permit) without presentation of original documents. However, port authority and customs regulations state that goods, left in their custody for more than 90 days, are declared abandoned and pass to public auction to offset expenses incurred and charges accrued. Thus while it is legally and practically possible to place a lien on goods, such action has limited scope in time."

Iceland

"We would like to inform you that it is legally and in practice possible to exercise lien on cargo in all ports of Iceland for unpaid freight, demurrage and damages for detention.

There is no difference whether the cargo owner or receiver is a state-owned company or a private company."

India

Calcutta

"At Calcutta all import cargo is discharged into Transit Shed of the Calcutta Port Trust unless receivers arrange to take overside delivery into their hired lighters. There is no separate storage space on shore to discharge cargo placed under lien.

Hired lighters may be obtained to discharge import cargo for eventual off loading at a Port

Commissioner Transit Shed but if the shipowners have a lien on cargo Port Trust will not accept such cargo into their transit shed. Accordingly the right to lien is actually ineffective.

Chennai (Madras)
"This right can be exercised either by the shipowners themselves or by the Master or the steamer agents on behalf of the owners. Besides freight, the owners can also exercise the lien for any other charges due to them. However, the port authorities should be informed by a notice in writing and it is also necessary that such a notice should be given either before or at the time of landing of the cargo from the vessel. The notice should specifically mention the exact amount due the owners.

Once the lien is exercised, the cargo will be retained by the Port Trust until the lien is released by the owners or other persons. It is also relevant to note that the cargo is retained by the Port Trust at the risk and expense of the consignee. As at present we do not envisage any problem of space in the port of Chennai (Madras) to retain such cargoes.

General
We would advise that the position is no different with regard to state-owned company and a private company.

With respect to shed space, we would like to advise you that many sheds have been demolished in the recent past and, hence, shed space is at a premium."

Cochin
"The matter was referred to the shipping sub-committee of the Chamber and according to them although in principle it is legally possible to exercise lien on cargo in the Port of Cochin for unpaid freight and/or demurrage or damages for detention - indeed the provisions of Section 60 of the Major Port Trust Act spell out this right - we cannot rule out practical problems which would depend on the circumstances of each individual case."

Mangalore
"Lien on cargo/vessel is legally permitted at New Mangalore Port. For the landing of cargo, the necessary wharf dues have to be paid and at the time of re-export also the wharf dues have to be paid according to the nature of the cargo.

Port godowns are available for stacking cargo: 3 days free period allowed for import cargo and 30 days free period allowed for export cargo. After these periods the cargo is liable for demurrage as per port rules. The cargo can be stored outside wharf premises provided prior warehousing licence taken for the godown and permission from customs obtained to stack the cargo 'Under Bond' till such time the re-export effected. The handling charges for stacking outside or inside wharf and go-down rent to owners account but can be claimed from cargo owner or receivers of the cargo.

Regarding customs the necessary permission can be obtained on filing a transhipment bill of entry. In case the cargo is not re-exported within the stipulated time, the customs will claim the import duty as applicable according to the nature of cargo.

In case the settlement of claim is not effected within the stipulated time, the cargo can be

auctioned provided all formalities with port and customs are completed satisfactorily on payment of duty and other levies. If the cargo belongs to state-owned company the terms and conditions of the lien to others are applicable to them also equally."

Mumbai
"At Mumbai, the Port Trust receive cargo from carriers and hold it as bailee and deliver the same to the consignees holding proper documents. This applies to both cargo discharged on shore as well as in barges.
If the carrier wishes to exercise lien on cargo he has to inform the Port Trust and ask them to withhold delivery. The port authorities generally respect such instructions unless receivers challenge such instructions through a court. This applies to state-owned companies also.

Despite the above, recently, in view of paucity of storage space within the port area, the Port Trust have taken a stand that ships carrying large quantities of certain commodities (woodpulp, fertiliser, clinkers, etc.) will not be allotted berths unless consignees agree to take direct delivery of such cargoes. In this eventuality, cargoes will not be stored in custody of the port authority and it will not be practical to exercise lien."

Visakhapatnam
"The port authorities have confirmed that the ship owners and/or their agents can exercise lien on cargo at this port. For your information, we may state that there is a provision in the Major Port Trusts Act reading as follows:

> 'If the Master or owner of any vessel or his agent at or before the time of landing from such vessel any goods at any dock, wharf, quay, stage, jetty, berth, mooring or pier belonging to or in the occupation of a Board, gives the Board a notice in writing that such goods are to remain subject to lien for freight or other charges payable to the shipowner, to an amount to be mentioned in such notice, such goods shall continue to be liable to such lien to such amount.' "

Indonesia

"As used in the strict sense of the term, Indonesian Law does not recognise the concept of a lien. In fact, Article 493 of the Indonesian Commercial Code goes further and explicitly forbids a lien. It provides that a shipper has no right to retain the goods as security until payment of freight has been made by the cargo owner/receiver. This article further provides that any agreement contravening this provision is null and void. Although there is no explicit mention of demurrage, we are of the opinion that demurrage would be included in the term 'payment'.

On the other hand, Article 317 of the Indonesian Commercial Code provides for a ranking of claims in actions against the cargo owner. The proceeds of the cargo sale are paid out in the following order. First, execution expenses. Second, salvage expenses and general average. Finally, claims arising out of the contract of carriage.

It is not unusual in Indonesian practice for shippers to provide a choice of law, or a convention such as the Hamburg Rules, to govern the carriage of goods by sea contract, which in turn provide for liens. The legality of this indirect nullification of Article 493 has not been tested in an Indonesian court.

The fact that the cargo owner is a state-owned corporation does not diminish the rights of the shipper or carrier. No immunity applies in this respect."

Iran

"Kindly be advised that as per Iranian maritime law Lien on cargo can be exercised in Iran on freight, demurrage and associated expenses but technically point of view it is sometimes very difficult. However, in normal practice if the shipment is on liner out basis, then the cargo can be discharged under full control of owners/owner's agents into warehouses and no delivery order will be issued as long as the matter has not been resolved.

But for the cargoes which are discharged on direct delivery basis such as grains and essential commodities (large quantities, perishable, etc.) due to limited warehouse space at port terminals, it is recommended to exercise the Lien when the cargo is on board. Because as per past experience for several reasons i.e. the amount of disputed freight a/o demurrage in comparison with cargo value, non-availability of warehouse, cargo necessity and nature of cargo, in several occasions state-owned essential cargoes have been discharged up to 80% by the official written request of respective minister.

So despite of the possible demurrage/detention cost involved, still in our opinion the best place to keep the cargo under custody till final settlement of freights a/o demurrages under dispute is the vessel."

Iraq

"Please be advised of impracticality of placing lien on cargo at this end."

Ireland

"It is legally permissible to exercise lien on cargo for unpaid freight, General Average contributions and for monies spent in protecting the cargo; throughout the ports in the Republic of Ireland.

In practice however, cargo cannot remain on the quay or in transit sheds within the dock area. It must be removed under bond to a third party bonded warehouse.

There is no distinction between state-owned and private company cargo owners or receivers."

Israel

"We translate hereunder Clause 19 of our General Contracts Law (Remedies for Breach of Contract) 1970 - as follows:

> 'If, pursuant to the agreement, the injured party received any property belonging to the party in breach, which the injured party is obliged to return (to the party in breach), the injured party shall have a lien over such property to the extent of the amount due to him from the party in breach, as a consequence of said breach.'

It is therefore clear that the right to a lien over cargo pursuant to a breach of a contract of

carriage is conferred by the above section and this right can only be reinforced by a contractual lien under the relevant contract of carriage. The above lien would cover unpaid freight, hire, demurrage or damages for detention and any other damages suffered.

In relation to the practical problem of storage, this aspect is perhaps more complicated. As a general rule, it is possible to store either in the port area, or in a bonded warehouse for more sensitive goods. In both cases, no problems are afforded by Israeli Customs and Excise laws and regulations, because the goods have not yet entered Israel for this purpose until cleared from the port area or the bonded warehouse.

We have however encountered difficulties with the port, where the nature of the goods does not permit storage in a bonded warehouse or where the goods were to be delivered by direct delivery to the consignee and the ports were congested at the time - because as mentioned above, the goods cannot be removed from the port area without customs clearance, and apart from any difficulties in the payment of the customs duties, there are additional problems arising from the import licence being issued in the name of the consignee and also the role and rights of the bank financing the purchase have to be considered. In these cases we have sometimes managed nevertheless to persuade the port authority to store the goods but there have been occasions when we have had to abandon the possibility of liening the cargo before leaving port and to seek alternative security."

Italy

"Liens on cargo are governed by Articles 561-564 of the Codice della Navigazione. They include liens securing claims for salvage, contribution to General Average and freight, including discharge and storage expenses (Article 561 C.N.).

Liens are extinguished if the claimant does not notify his objection to the redelivery of the cargo to the Master or, alternatively, does not commence any action (such as making an attachment of the cargo) within 15 days from discharge and before cargo is delivered to third party.

It follows from the above that after discharge a lien can be enforced provided the cargo is still in the possession of the carrier or of a stevedoring company/terminal operator."

Ivory Coast

"Although this procedure is not usual practice in Côte d'Ivoire, it has been done in the past for unpaid freight. It mainly depends on the local Court's decision and has to be dealt with case by case. We cannot assure that it could be done when cargo owner/receiver is a state-owned company."

Jordan

"The Maritime Commercial Law of Jordan contains only one section which deals with lien on cargo for non-payment of freight. We give you below a translation:

> **'Section 197:**
> The lessor of a ship shall have a right to hold back the cargo in case of failure to pay the

hire of the ship unless he is given a guarantee. He may also request the placing of the goods in the custody of a third party until the hire of the ship is paid, and may request the sale of the goods if they are perishable.'

Although this section deals with the exercise of lien by the owner on the cargo for non-payment of the hire of a chartered vessel, our lawyers are of the opinion that it may also be relied on to exercise a lien on individual consignments for non-payment of freight. There is no provision in the Law for the exercise of a lien on cargo for non-payment of demurrage or damages for detention.

Finally we wish to point out that no facilities are available at Aqaba port (special storage space on shore or barges) which make possible the exercise of lien on cargo from a practical point of view. There is no difference in the legal situation if the cargo owner/receiver is a state-owned company or a private company."

Kenya

"Every bill of lading provides that the vessel will have a lien on cargo for unpaid freight and other amounts such as demurrage or damages. However, it is sometimes difficult in practice to enforce this lien. Arrangements would have to be made with the Kenya Revenue Authority to offload the cargo into Customs bond so that the vessel does not have to pay import duty and other similar charges thereon.

Once the cargo has been placed in bond the vessel will have to pay rent for the cargo and will already have paid stevedoring charges to offload the cargo and transport charges for ferrying the cargo to a bonded warehouse. Then the vessel is to consider the position if the consignee or the receiver does not come forward to claim the cargo. In that event the cargo will then have to be sold under Customs supervision at Mombasa or if the Customs so insists it might have to be re-exported. Again more stevedoring and freight charges.

The storage is not an obstacle in the way as there is at the moment at least plenty of storage space available in bonded warehouses. What the vessel has to consider is the initial expenses which have to be met by the vessel, that is stevedoring, transporting and rent. Then if the cargo is to be sold, the payment of customs duty and other dues to the Kenya Revenue Authority which would be the first charge on the sale proceeds. If the sale proceeds are insufficient to cover that outstanding, then the shortfall will have to be met by the vessel. In addition, it is always a problem in such a case to decide what to do with perishable cargo. The vessel does not want the cargo to perish whilst under lien as that would mean charges including Customs duty which become payable when the cargo is rendered valueless. It may be possible in such a case of perishable cargo when the cargo has perished to obtain duty refund from the customs.

All in all the right of a lien exists and is exercisable but you will see from the foregoing that there are practical difficulties in the way".

Korea, Democratic People's Republic of

"We are pleased to inform you that it is possible to exercise lien on cargo in the ports of the Democratic People's Republic of Korea."

Korea, Republic of

"It is possible legally to exercise lien on cargo for collection of unpaid freight and/or demurrage. However, it is practically ineffective to exercise lien on cargo after completion of discharge.

In the meantime, in most cases import-clearance of lot-cargo (viz. grain, coal, log and/or liquid cargo, etc.) is made by cargo receiver with customs officers on board ship before commencement of discharge. Thereafter the cleared cargo is automatically delivered to receiver upon discharge and to be stowed in an exclusive storage or warehouse for receiver's convenience sake.

As per our past experience, some owners instructed Master not to commence discharge or to stop discharge (if already commenced discharge) until receiving pending freight, demurrage or any compensation from charterers. We learnt that this kind of action is more effective to enforce charterers to pay freight immediately.

There is no difference between state-owned company and private company at all."

Kuwait

"In reply we are of the opinion that there seems to be no possibility of placing lien on cargo in Kuwait."

Lebanon

"The Lebanese laws give the carrier or the hirer-out of a vessel the right to exercise a lien on the cargo to secure payment of the freight and accessories. Articles 193 and 194 of the Lebanese Merchant Shipping Law stipulate that as guarantee for the payment of the freight and accessories, the hirer-out shall have a lien on the goods composing the load, for a period of 15 days after the delivery if the goods have not passed into the hands of a third party. The hirer-out may retain the goods, in the event of non-payment of the freight, unless he has received a security. He may also require the goods to be deposited with a third party until the freight is paid and even demand their sale if they are perishable.

Therefore, the carrier or the shipowners can exercise a lien on the cargo when same are in the hands of the port pursuant to the provisions of Art.193 and 194 above-mentioned. In practice, in Beirut port, there are storage facilities for bulk and general cargo as well as for containers. In the other smaller ports, there are only storage facilities for specific kinds of cargo.

Furthermore, it is relevant to point out that that the carrier and the owners can apply to the Court for the attachment of the cargo deposited with the port authorities to secure their claim in respect of the unpaid freight/hire and/or accessories.

As to whether there is any difference in the situation if the cargo receiver is the Lebanese State or a private entity, we point out that under the Code of Civil Procedure the properties and assets owned by the State are not attachable. This rule of law would make it not possible to exercise a lien on a shipment which is the property of the Lebanese State."

Libya

"Lien can be placed on cargo on clear instructions issued by the carrier and or the shippers to local shipping agents not to issue delivery orders to consignee. The reason must be specified in these instructions as might be required by Customs and or Port Authorities.

Instructions must also be clear, either not to allow unloading cargo from carrying vessel and or not to issue delivery orders after cargo has been unloaded and stored at the customs' storage. Attention has to be considered by parties requesting lien that storage fee has to be charged to unloaded and stored cargo at the customs' storage."

Madagascar

"Please be informed that the only possibility of placing lien on cargo in Madagascar is not to release the cargo to owner/receiver whatever he is (state-owned or private company). Cargo is then placed under Customs and port custody and storage charges incurred will be for account of cargo."

Malaysia

"Basically it is possible to exercise a lien on cargo at Malaysian ports both from the legal and practical point of view. Cargo is discharged to common user facilities and, notwithstanding the obvious restrictions that would apply to dangerous and unusual cargoes, there would be no particular constraint.

The various port authorities would themselves exercise their own lien on cargoes for which port charges remain unpaid."

Maldives

"**1)** Cargo can be held under lien in the Port(s) of Maldives only by court order.

2) There is no specific storage places on shore or in barges for held up cargo.

3) Maldives Ports Authority will charge storage on cargoes held according to their tariff."

Malta

"We have your letter dated ... under reply, contents of which have been passed to our legal adviser who comments as follows:

... According to Section 2113 of the Civil Code, the debts due for the carriage of goods are considered privileged debts over the particular goods carried. These privileges are considered under our law to be special privileges which according to another section of the law (Section 2106 (1)) cease to exist if the property, (namely the goods), passes into the hands of a third party.

It is, therefore, practically impossible to register such a special privilege, because property in the goods is very easily transferable.

However there are other ways, according to our law, how a creditor may protect his interest in such cases. He may demand the Court to issue Precautionary Warrants of Seizure and Garnishee Order and property so seized would not be able to leave the Island until an adequate banker's guarantee is provided. Naturally such warrants, being of a precautionary nature, have to be followed by a writ of summons. This has to be filed within 10 days from the filing of precautionary warrants, as otherwise the said warrants would lapse and be void at law." This procedure is applicable either if the cargo owner/receiver is a state-owned company or a private company.

In order that this procedure may be availed of, the ship on which the goods are carried has to go to a port in Malta in order that our Courts might possibly acquire jurisdiction to deal with the claim. Naturally, a Power of Attorney would also have to be issued in your (representatives) favour by the claimant.

In so far as Jurisdiction is concerned, I used the word 'possibly' because one is also to see whether in accordance with the terms of the contract entered into between shipowner and cargo-owner they have agreed to settle their differences in a particular Court to the exclusion of all others or through arbitration; if such is the case and the would-be defendants were to submit such a plea in an eventual Court case, then the first hurdle to overcome would obviously be this, namely whether our Courts would have the right to decide a dispute between two foreigners, based on a contract entered into freely between them abroad and particularly if by virtue of which they had also agreed to refer their differences to arbitration.

On this point, our case law is at variance, because there are several judgements which uphold the parties' choice of resolving their differences in the way they would freely have chosen so to do, whereas other judgements have decided that notwithstanding such a clause, our Courts have jurisdiction to decide the dispute. If, on the contrary, one of the parties is Maltese we feel that the problem of the jurisdiction of our Courts should not arise, but naturally that of the competence thereof could arise only if, in accordance with the terms of the contract, they had inserted an arbitration clause ..."

Martinique

"It is legally possible to exercise a lien on cargo in port of Fort de France for unpaid freight and other authorized reasons.

If it is a complete container it can be placed in the port area, if it is part of a container, we have an unstuffing container service where cases can be placed. However, excluding the petroleum products, we can say that 90% of cargo arriving in Martinique is now containerised. There is very little space in the warehouse in the port area, so for a general cargo non-containerised, it may be a problem of space.

Otherwise French law applies in the territory of Martinique."

Mauritius

"We would advise that it is legally possible to exercise lien on any cargo (private or state-owned) in Mauritius for unpaid freight and/or demurrage of damages for detention. However,

if the cargo is not released or taken delivery of after three months, the customs authorities cause the goods to be sold at auction.

The party exercising the lien can request the customs authorities to refund the amount due out of the proceeds of sale and this is effected after deduction of all local charges borne by the cargo comprising customs duty, storage charges etc."

Mexico

"The possibility is definitely given by Navigation and Maritime Commerce Law. There is no difference in situation whether state-owned or private company."

Morocco

"Concerning the possibility of placing lien (saisie-arrêt) on cargo in Morocco, we can inform you that, in principle, this is possible by instructing a lawyer to apply to the Court and would be subject to the following documentation being produced:

- Invoice for the amount claimed in the name of the owners of the cargo.
- Proof that unpaid freight and/or demurrage has been claimed from the cargo owner, i.e. exchange of correspondence/telex.
- Copy of the charter party with the translation in Arabic of the provision pertaining to right of lien
- Original or copy of the bill of lading

If the unpaid freight and/or demurrage has been disputed, then it is unlikely that the Court would accept a request for arrest of cargo. With respect to damages for detention, we are not at all sure that the claim would be successful. In practical terms, the possibility of placing lien on cargo in a Moroccan port can be summarised as follows:

Cargo discharged into port sheds
The procedure is fairly straightforward and quick on working days and subject to the production of the above documentation. There is usually no lack of storage space in a Moroccan port.

Cargo discharged direct to road or rail
transport for immediate withdrawal from port area
Certain cargoes such as bulk fertilisers, explosives and dangerous cargo and certain other homogeneous cargoes are not permitted to be stored in the port area (chiefly Casablanca) but are required to be removed as and when discharged. In practical terms therefore a lien, if obtained by Court order on such cargo, would be ineffective.

In principle, there should be no difference in the situation if the cargo owner/consignee is a state-owned company; however, in practical terms, there could be difficulties."

Mozambique

"We confirm that it is indeed possible (and legal) to exercise lien on cargo in the port of Beira for the reason mentioned in your letter - on shore as there are no barges here.

You will, of course, appreciate that storage charges will be incurred if cargo remains in the port area for any length of time, however, this would be the position anywhere else in the world too.

Although in theory a lien can be placed on government cargo, we are a bit reluctant to confirm with exactness that there will be no complications if this right is exercised, which we trust you will appreciate."

Namibia

"We confirm that it is possible to place a lien on cargo in Namibia for unpaid freight and/or demurrage or damages for detention.

For unitised cargo, bonded warehousing facilities are available in the port and outside the port. However, these are subject to Customs regulations that cargoes still under lien after 28 days, must be moved to the States Warehouse (Ministry of Finance).

On clearance, cargoes will be released from the States Warehouse after payment of storage and handling plus duties has been made to Customs. The shipping line charges and other charges are secondary charges, which are collected prior to release. If cargo is not cleared/ released, Customs will auction the goods and initially utilise the funds to cover their States Warehouse storage and handling costs. If funds retrieved from the auction are not sufficient, the shipping lines charges and other charges are not recoverable.

There are no barges available in Namibia to store bulk cargoes. The port is able to store a certain amount of bulk cargo (manganese, coal, sulphur etc) but it is not recommended if the cargo is under lien.

According to regulations there is no difference in the situation if the cargo owner/receiver is a state owned company and not a private company".

The Netherlands

"Article 8:489 Civil Code deals with lien on cargo, although the Dutch translation is not entirely identical to "lien".

Article 8:489 Civil Code stipulates that the carrier is entitled to refuse to hand over things, which are detained in connection with the contract of carriage, to a person having the right to delivery of those things pursuant to title other than the contract of carriage. Such a lien is not possible if the things have been seized and there is an obligation to hand over the things to the seizor.

The lien may be exercised for anything the recipient owes and or will own the carrier in respect of the particular transport, i.e. freight, demurrage, damages for detention and or costs en route.

There should be no practical problems in that there is sufficient storage space. The carrier will have to advance money required in respect of the lien. Those costs are, however, reclaimable by the carrier."

Netherlands Antilles

"Under Netherlands Antilles law it is indeed legally possible to exercise a lien on cargo (private and/or state-owned).

On the other hand, due to lack of sufficient warehouse space (hence subject to the quantity/volume of cargo involved), the question of feasibility in practice may be more doubtful."

New Zealand

"It is both possible, and, indeed, practice, to place such liens on cargo for unpaid freight and/or demurrage.

There is storage space available for this purpose, and usually this is provided either in a wharf shed or open stacking area. In some ports the port authorities offer an off-wharf storage facility, and it is this space that would most likely be used for detaining any cargo. The issue does not, however, arise frequently.

There would be no difference if the consignee is a state-owned rather than a private company."

Nicaragua

"It is legally according to Nicaraguan laws to exercise lien on cargo in ports for unpaid freight and/or demurrage or damages for detention.

Legal action is to be taken by shipbroker or someone with general power of attorney good enough to litigate in the country. The lien is declared by very fast judicial proceedings and then go to a full trial or non-expedited trial to declare the right of the plaintiff over the cargo and the appropriation.

It will not make any difference if the cargo owner received is a state owned company or a private company. Please remember that B/L freight collect are handled by legal representatives of vessel at Nicaragua and they will not surrender B/L if it is not paid; an importer can not obtain merchandise from customs without paid B/L."

Nigeria

"We refer to your letter .... on the subject matter and in reply wish to advise that the only possibility of exercising lien on cargo to Warri port is to discharge such cargo into barges. However, the question is 'who pays for the barges?' The cost of hiring a barge probably exceeds NGN 500.00 per day besides the stevedoring charges 'In and Out' for barging of cargo, which is approximately at the rate of NGN 14.75 per ton.

Generally, the possibility of taking lien on cargo in any Nigerian port without running the above-mentioned expenses is very remote because the port operators will not allow any voluminous cargo to be discharged on their quays without the consignees taking direct delivery from the ship; if not, the authority prefers such cargo to remain on board instead of being discharged on to their quays."

Oman, Sultanate of

"A lien on cargo is allowed under Omani law for unpaid freight and/or demurrage or damages for detention. The carrier in such cases has the right to arrest the cargo and refuse its delivery to the consignee until the amount claimed is paid or security given for same. If the consignment consists of perishable goods and the carrier fears that it will deteriorate or perish, the carrier can in such circumstances apply to the Court for the sale of the cargo.

In so far as the ports of Mina Qaboos and Mina Raysut in the Sultanate of Oman are concerned, they have adequate storage facilities, excepting reefer breakbulk.

There is no difference under Omani law whether the cargo owner/receiver is a state-owned company or private."

Pakistan

"It is legally possible to exercise lien on cargo for unpaid freight and/or demurrage, etc. in Pakistan. However, due to non-availability of suitable storage space, in practice it is very difficult to exercise such lien. It is all the more impossible in case of bulk cargoes.

The position remains same whether the cargo owner/receiver is a state-owned company or a private company."

Panama

"For your information and guidance, under Panamanian law it is indeed possible to place a lien on cargo and storage space is available where the cargo can be placed into custody of the authorities until the case is settled.

Depending on the circumstances, this action may however not be very practicable, especially when it concerns cargo on board vessels transiting the Panama Canal, that is not destined to be discharged at a Panamanian port.

The law does not differentiate whether it is a state-owned or a private company and there should be, in principle, therefore, no difference whether the lien is exercised against cargo owned by a private company or a state-owned entity."

Peru

"We want to inform you that in Peru it is possible to retain cargo under custody in an authorized warehouse up to consignee pay freight, however, it is very important to mention that shipping agent should be instructed to proceed in this way, further explaining reasons for which cargo should not be released as there will be additional expenses to be assumed by cargo receivers.

Regarding State cargo, this matter is complex as Customs is a government Office and may occur State demand cargo release, although it wouldn't be a legal proceeding, you will understand it is very difficult to maintain discrepancies with Government"

The Philippines

"Quoted below is an extract from the Tariff and Customs Code of the Philippines:

> **'Section 1505**
> Withholding Delivery Pending Satisfaction of Lien - When the Collector is duly notified in writing of a lien for freight, lighterage or General Average upon any imported articles in his custody, he shall withhold the delivery of the same until he is satisfied that the claim has been paid or secured. In case of a disagreement as to the amount due between the party filing the lien and the importer regarding the amount of the freight and lighterage based upon the quantity or weights of the articles imported, the Collector may deliver the articles upon payment of the freight and lighterage due on the quantity or weight actually landed as shown by the return of the proper official or by other means to his satisfaction.'

The above provision specifically refers to liens for unpaid freight, lighterage or General Average. However the Collector of Customs, in the past, favourably considered our request to withhold delivery of a shipment until our claim for demurrage charges was paid leading us to conclude that in practice the Collector of Customs may also withhold delivery for other valid reasons.

Regarding the space for storage of cargo until payment of the claimed amount, we believe that this should not be a problem in the port of Manila because of the availability of ground spaces (FCL cargo) and sheds (for LCL cargo) within the port.

In theory, there should be no difference between cargo owned by a state-owned company and a private company.

The Tariff and Customs Code also provides that abandoned articles, seized goods or articles not claimed due to the inability of cargo interest to pay customs duties/taxes shall be sold by customs authorities at public auction. Out of the proceeds, liens are satisfied in the following order: (a) expenses of appraisal, advertisement and sale, (b) duties, (c) arrastre and private storage charges, (d) taxes and other government charges, (e) storage charges and (f) freight, lighterage or General Average."

Poland

"Under article 149 of the Polish Maritime Code of 2001 (the PMC), the carrier may refuse to deliver the cargo and retain it until the consignee has paid or secured the amounts as falling on the latter by way of carriage of the relevant cargo as well as by way of contribution by the cargo in general average and salvage remuneration. The right of retention of cargo (English "common law" lien), is distinct and should not be confused with the concept of maritime liens under Polish maritime law.

Under articles 156-158 of the PMC, for securing privileged claims a statutory lien on the cargo is given, with priority over other claims, even those secured by a lien arising from a contract or judicial decision.

In the absence of provisions of the PMC, provisions of the civil law (in most cases the provi-

sions of the Polish Civil Code of 1964 with subsequent amendments (The PCC) are applicable to the civil-law relations incident to maritime shipping (art. 1 paragraph 2 of the PMC).

In connection with the provision of said art. 1 paragraph 2 of the PMC and by virtue of articles 326 and 312 of the PCC concerning the Pledge on Movables - the satisfaction of the pledgee/ the privileged creditor, from the encumbered thing/cargo shall take place, in accordance with the provisions on court execution proceedings."

Portugal

"Portugal acceded to the Brussels Sea Act of 1924 on 1 February 1950 (Decree Law 37.748). According to the Portuguese Commercial Law Code - CLC, (Art. 580), the carrier has the right of placing lien in the fourth place after debts due to judicial costs, salaries due to rescue and fiscal duties at the port of discharge.

The lien based on freight and discharging costs ceases according to Art. 391 of the CLC with the delivery of the goods to the consignee and if carrier does not use his rights within ten days before the delivery of the goods to a third party (Art. 581 CLC). Therefore the carrier has the right and the possibility to proceed to storage under custody in order to guarantee the payment of his credits. The trustee may be any qualified and liable entity indicated by the Court but based on the suggestion of the concerned.

There is no difference at all if the cargo owner/receiver is a state-owned company."

Puerto Rico

"There are public warehouses in Puerto Rico that can provide storage for cargoes such as you describe. This has been done and it is commonplace to handle delinquent accounts in this manner. It does not matter if it is a government entity or a private corporation/individual".

Qatar

"As regards Lien Decree Law No. 29 of 1966, Chapter IV Article 49 reads:

> 'If the Master or Owner of any ship or country-craft gives to the Port Manager notice in writing that the goods intended for landing are to remain subject to a lien for freight, primage or general average stating the amount demanded, the Port Manager may order the retention of such goods under lien and non-delivery to consignees at whose risk such goods shall remain until such lien is discharged and a decision for delivery to consignee is issued. The Master or Owner shall produce to the Port Manager within 48 hours after giving such notice, the statements supporting his request otherwise the lien shall he regarded as discharged. Fridays and official holidays shall not be counted as part of the said period.'

Regarding the practical possibility, we can only suggest that no Delivery Order be issued until collection of unpaid charges but then there is the question of demurrage accruing rapidly. In respect of a state-owned company no such situation normally arises. If they are not in possession of a negotiable Bill of Lading they clear their cargo against a Bank Guarantee for C&F or CIF value."

Reunion

"We confirm that it is legally possible for shipowners to exercise lien on cargo in ports of Reunion Island for unpaid freight and/or demurrage or damages for detention. However there is no special storage space where the cargo could be placed into custody but the cargo could be retained within the port premises upon request from the shipowner to the port authority. There is no difference in the situation if the cargo owner/receiver is a state-owned company and not a private company."

Romania

"According to the Romanian Commercial Code, the cargo on board a ship calling at the Romanian ports could be liened by depositing it in the hands of a third party, on shore, during discharging. As an exception, when there is not sufficient storage space available, the lien could be exercised by retaining the cargo on board the ship, until sums due are paid.

It is obvious, therefore, that there are no legal or practical impediments to the exercise of a lien over such cargoes at Romanian ports."

St. Helena

"Lien on cargo at St. Helena is not practical because of inadequate storage facilities."

Sao Tomé

"For loose cargos there are different charges pending on volume, size, weight and type of storage: In door storage or out door storage.

Attention: In order to place lien on cargos, the cargo's owner must not have on hand the original Bill of Lading and your Representative Agency here must have a valid credential to act as such. There is no difference in the situation if the cargo owner/receiver is a state-owned company and not a private company."

Saudi Arabia

"To update your records we are reproducing here below the Article No. 6.2.14 (Cargo subject to Lien) of the Rules and Regulations for Seaports, March 1985, of the Co-operation Council for the Arab States of the Gulf.

> **'6.2.14.1**
> In any case, where the Master, owner or the ship's agent of any vessel, at or before the time of landing of the goods, gives to the port notice in writing that such goods are to remain subject to a lien for freight, primage or general average of an amount to be mentioned in such notice, such goods are to continue liable to such lien after landing and are to be retained in the custody of the port at the risk and expense of the consignee or owner of the goods until such lien is discharged. The Master, owner or ship's agent of the vessel giving such notice shall within two clear working days produce to the satisfaction of the port proof of lien, failing which the lien shall stand as discharged.'

Please note that cargo such as frozen goods, bagged sugar, barley in bulk etc. may not be placed under lien.

Generally speaking, perishable cargo may not be placed under lien although we know from experience that barley was placed under lien and stored on board the same vessel."

Senegal

"We confirm that it is possible to place lien on cargo in our country. Meanwhile there is a procedure to be followed which is described as follows:

1. To detain original documents clearly stating the debt/right on concerned cargo.
2. To appoint a lawyer/solicitor who will contact any Court President, due to quickness of operations in the shipping field.
3. The Court President, when convinced, authorises lien.
4. The Court authorisation is served to all concerned parties by a Process Server.
5. Often the cargo/vessel's consignee/agent and/or stevedore is designate cargo Keeper by law.
6. The cargo Keeper will release cargo only on sight of a Court decision (also served by Process Server)."

Serbia & Montenegro

"We would like to inform you that lien on the cargo is allowed by the law. As per the law, shipowner does not have the right to exercise lien on cargo if the receivers are not obliged to pay claims in respect of the voyage.

The shipowner has the right to take care of the cargo or to put the cargo in the public warehouse. The shipowner has the right to sell the cargo if his claimed amount was not paid within 30/thirty/days from the day when the cargo was put into the custody of the warehouse.

From the selling price the shipowner has the right to cover his claims in respect of the voyage, costs of the warehouse and the cost of selling as well. The rest of the amount must be put in the deposit with the court.

For the above-mentioned procedures the shipowner is not obliged to ask permission of the court.

I consider that in the main port of Bar and also in the river ports on the Danube, there is enough space in the public warehouse where the cargo could be placed. All warehouses belong to the ports.

There is no difference in the situation whether the cargo owners /receivers are a state owned company or a private company."

Seychelles

"Whereas it is legally possible to place lien on cargo, our limited storage facilities do not permit us to hold these in situ indefinitely. Hence, such cargo would have to be moved to bonded storage areas under direct Customs authority and control.

In any case, all charges and/or demurrage accrued and applicable would become the responsibility of the organisation having lien on the cargo. This would apply irrespective whether such cargo is for the Government or is privately owned as such charges including demurrage, are applicable to all cargo landed to port."

Sierra Leone

"We understand that legally it is possible to exercise a lien on cargo in ports of Sierra Leone on private or state-owned merchandise.

In practice it would be found difficult to proceed; the only warehouse space within the port is owned by the port authority to whom rent charges become payable after ten days of discharge. After one month additional rent is charged by the Customs Department.

Furthermore, the port authority would view continued delay in removal as hindering the use of their transit sheds for the proper purpose. This could eventually lead to the authorities insisting upon the auction of the goods.

Obviously the authorities more especially view with displeasure delay to large consignments of flour, sugar or similar commodities. It is likely, that if the intention to exercise a lien became known to them prior to or during discharge, facilities for storage would be refused."

Singapore

"Please be advised that it is quite legal for agents to detain cargoes in the Singapore port premises if the ocean freight has not been paid and the port/terminal operator will not release the cargoes until he receives the "Delivery Order" from the agent authorising him to release the cargo to the consignee/receiver, such practice is a common practice here.

Detaining of cargoes for unpaid demurrage or unpaid damages is quite rare here since such disputes are usually between the shipowner and the charterer without the receiver being involved. Of course it is also possible to hold the cargo in port warehouse until the demurrage or damages have been paid by the parties concerned.

There are plenty of port warehouses for detention storage of cargoes and agents normally make the receivers pay for the storage charges (on top of the freight) before releasing the cargoes to the latter."

Slovenia

"**1.** Lien is legal and also exercised in practice (observing laws and rules which are not too complicated).

2. Storage space is available.

3. Geo area of Port of Koper (Luka Koper Ltd.) is customs bonded free zone t/4 no specific customs custody storage is needed.

4. No difference between state and private company."

Solomon Islands

"Legally, it would be possible to exercise lien on cargo in Solomon Island ports. However, this would only be possible for small consignments as we do have limited storage space in customs bonded areas".

South Africa

"South African law recognises the right of a shipowner, charterer or any other party in possession of cargo, such as a freight forwarder, container depot operator or ship's agent, to exercise a lien over cargo for payment of any amount due in respect of that cargo, (including freight, demurrage and detention), if such a lien is afforded either contractually or by South African common law, or in some instances the law of the country where the cause of action arose.

South African common law only grants carriers and their agents a so-called "special lien", i.e. a lien which may only be exercised over those specific goods in respect of which money is owing, and does not grant a carrier a lien over all the debtor's goods which may be in his or his agent's possession.

In order to exercise a lien the carrier must:

1. have continuous physical possession of the goods, either on board the vessel, or ashore on the premises of an authorised agent, such as a container depot, who has agreed to retain the goods on the carrier's behalf; and

2. must be able to show that the amounts in respect of which a lien is exercised are due and payable, (i.e. if the obligation on the debtor to pay freight arises only after delivery of the cargo to it, and not prior to, or contemporaneously with, delivery, then a lien may not be exercised).

It is not necessary to "perfect" a lien through the Courts.

Previously, it was possible to exercise a lien through the South African Transport Services, (SATS), which administered South Africa's harbours. With the privatisation of SATS in 1989, the statute, which provided for this procedure has been repealed and this avenue is no longer open to carriers. It is still theoretically possible to approach PORTNET, the legal successor to SATS, and request it to exercise a lien on the carrier's behalf. However this is not a feasible option in practice.

In order to lift the lien the debtor must either pay the full amount owing, or furnish adequate security for payment of the debt secured. In practice the carrier will exercise its lien by caus-

ing the cargo to be placed in a warehouse under its or its agents' control. However this is not always possible, particularly where goods are stored in the PORTNET Container Terminal or at a warehouse or yard which is not under the control of the carrier or its agent.

In those circumstances, the safest way to "exercise lien" is to proceed through the Courts by arresting the *carto in rem*. The procedure is simple and relatively inexpensive and can, if necessary, be done in a matter of hours, rather than days."

Spain

"Spanish legislation establishes the legal possibility to exercise lien on cargo for unpaid freight and demurrage or damages for detention. The legal procedure starts with the Captain's demand for lien to the Court followed by a judicial deposit, depending on the kind of merchandise, to which is added storage costs.

There is no difference if the cargo owner/receiver is a state-owned or a private firm."

Sri Lanka

"Legally it is possible to exercise a lien on cargo in the ports of Sri Lanka for unpaid freight and/or demurrage or damages for detention but whether the port authority can provide storage is questionable. Therefore the only alternative that one would be faced with is to retain the cargo on board, pending settlement of the dispute.

During our recent discussion with the ports authority on this subject, we were made to understand that the restricted warehouse space may pose a problem but due consideration will be given, depending on the volume or quantity and the type of commodity which is to be stored in the warehouse.

In the event a lien is imposed whilst the vessel is discharging cargo into the warehouse, the port authority may continue discharge of the balance cargo into the warehouse provided there is sufficient space and it will not cause an obstacle in their future operations. In case the balance cargo cannot be discharged into the warehouse it will have to remain in the ship's hold pending settlement of the dispute. The vessel will automatically be shifted from alongside to a stream berth where she will remain idle. In case the vessel is discharging cargo into barges, continuation is impossible due to insufficient barges.

With regard to state-owned corporations/Food Department a lien on cargo could also be applied legally, but where the Food Department is concerned they could always requisition same under emergency regulations."

Sudan

"There is a legal and practical possibility of placing lien on cargo in Sudan.

There is no difference whatsoever in the situation whether the cargo owner/receiver be a state-owned unit or otherwise. Also, there is no problem at all as regards storage space in which to keep cargo in custody until payment is made."

Surinam

"Please be advised that according to our legal advisor the possibility of exercising lien on cargo exists under the law of Surinam."

Syria

"The commerce in Syria is divided between private and public sectors. Lien on cargo belonging to private sector is legally possible in Syrian ports.
The claimant has, however, to take into consideration:

1. The storage dues which are very high in Syria.

2. The kind of commodity, whether or not it is perishable and capable of being stowed.

3. Both at Lattakia and Tartous there may be lack of storage space."

Tahiti

"It is legally possible to place liens on cargoes at Tahiti for unpaid freight, demur-rage, damage or other reasons, although to our knowledge this has not occurred in recent times.

On a practical basis storage would be a difficult problem. Barges are not available and even if they were Customs would not allow such a storage out of the Customs storage areas prior to cargo clearance.

Uncleared cargo remaining in the Customs port warehouses and/or in the port container storage zone may be subject to fine, seizure and eventual auction if the cargo remains on hand uncleared for 45 days following arrival. The only possible alternative would be to place the uncleared and undelivered cargo in litigation under lien into the general storage (in bond) warehouse with the corresponding extra costs increasing daily pending normalization of the cargoes status."

Tanzania

"In the above connection we would like to confirm that it is legally and practically possible to exercise a lien on cargo in the ports of Tanzania for unpaid freight and demurrage charges for detention.

With regard to storage space, occasionally Tanzanian ports have been considered as goods transit warehouses where cargo is kept for a minimum possible time, and cleared as soon as practicable by the consignee. In this regard, if the consignee were to place a lien on cargo, he would naturally be expected to seek a Customs bonded warehouse outside the port where the cargo could be kept in custody."

Thailand

"We would advise that customs regulations state all inward cargoes are to be stored at PAT's

warehouse (Port Authority of Thailand) and consignees or the holders of Bills of Lading have to arrange clearance of their cargo within a period of two months and fifteen days from the date of arrival of the carrier. If the cargo is not cleared within this specific period, it is liable to confiscation and will be auctioned to the public by customs.

The money earned from the auctions is to be paid to customs, PAT and ship's agents in compensation for customs import duty, go-down rent and freight charge respectively.

We are of the opinion that the cargo can be withheld for a period of time until freight payment has been made but it is not possible to exercise lien on cargo due to customs regulations as mentioned above."

Trinidad & Tobago

"It is possible to exercise lien on cargo in port(s) of Trinidad &Tobago for unpaid freight and/or demurrage or damages for detention as follows:

1. We can advise the Port Authority in writing to withhold delivery of the cargo until such time that we are paid the freight and/or demurrage charges. Or

2. Through legal representation."

Tunisia

"Please note that it is legally possible to exercise lien on cargo in storage space in Tunisian ports for unpaid freight, demurrage etc. The following procedure must be complied with:

a) Master and/or owners are not allowed to keep cargo on board.

b) Through a lawyer owners can present a claim and obtain conservatory judgment for exercising lien on cargo after presentation of all necessary and supporting documents. Stevedores will be responsible for storage of such cargo after being advised by Public Notary about judgment.

c) Owners must thereafter and through their lawyer present the claim to obtain final judgment that freight, demurrage etc. is paid to owners. All storage dues are for receivers' account. If this is not paid cargo may be sold when owners may seek satisfaction for their claim.

There is no difference in the procedure between state-owned or private companies."

Turkey

"Section four of the Code for Commercial law (TTK) regulates matters arising from maritime disputes. In TTK there are two articles pertaining to lien on cargo:

TTK Art. 1077:
According to this article, the owner has a lien on cargo for freight and demurrage provided the owner still has possession of the cargo. This means that the right begin when the goods are on the tackle of the ship (on FIO terms when the goods are on board the ship).

In other words, a contract of carriage or a fixture is not sufficient; the owner must be in possession of the cargo. The right will continue up to the delivery of the cargo (either to the consignee or to the port authorities) and there is a 30 days period, beginning from the delivery, for suing (in order to enable the owner to exercise the lien) the consignee/possessor, who takes delivery of the goods. If this person delivers the cargo to third party, whether in good faith or not, the lien on cargo will come to an end.

TTK Art. 1258:
This article regulates the exercising of the lien on cargo (besides general average and salvage charges) for unpaid freight and demurrage. According to this article the owner has a priority over others for obtaining freight and demurrage charges if the cargo is sold in pursuance of a court order to that effect. There is, however, a limited liability for the possessor of the cargo: the sum obtained when selling the cargo limits possessors' liability. In other words, when the sum is not sufficient, it is not possible for suing the possessor for the remaining part. It is prerequisite for the continuing lien that the cargo is in possession of the ship or the consignee or third party not aware of the existence of the lien.

In practice, there are special storage places in some larger Turkish ports where the cargo could be placed into custody until payment of the claimed amount has been made.

As to the question of the difference between a state-owned company and a private company, there is prohibition for exercising lien over state-owned goods."

Ukraine

"**1.** The possibility of placing lien on cargo in Ukraine is established by Articles 163 and 164 of the Merchant Shipping Code of Ukraine.

'**Article 163. Payment on receipt of cargo**
When receiving cargo the Consignee shall reimburse expenses, born by the Carrier on account of the cargo, perform payment of demurrage at port of discharge, payment of freight and demurrage at port of loading if thus provided by bill of lading or other document covering carriage of cargo, and, in case of general average, perform average payment or provide proper security.

The carrier may not deliver cargo prior to payment of sums or provision of proper security, mentioned in the first part of the present article.

The carrier shall retain the right to detain cargo in case the cargo is delivered to storehouse not belonging to the Consignee, on condition of informing the owner of the storehouse about such right.

After delivery of cargo to the Consignee the Carrier shall lose the right to claim from the Consignor or Charterer outstanding payments, except for cases when the Carrier could not exercise its right to detention of cargo for reasons that are out of his control.

Article 164. Lien on cargo
In order to provide security of claims, mentioned in part one of Article 163 of the present

Code, the Carrier shall have right to place lien on carried cargoes.

Lien shall terminate in the following cases:

1) Delivery of cargo to the Consignee;

2) Satisfaction of the Carrier's secured claims;

3) Acceptance by the Carrier of other proper security.

The Carrier shall have the right, according to the procedure, established by the legislation, to sell cargo which is the object of lien, having properly informed the Consignor or Charterer and Consignee,

Out of the sums raised from realization of cargo, the Carrier's claims, mentioned in part one of Article 163 of the present Code, shall be satisfied after payment of court expenses, expenses on storage and realization of the cargo.

If the amount, raised from realization of the cargo, is insufficient to cover expenses, mentioned in part one of Article 163 of the present Code, as well as interest and losses, caused by delay in payment, the Carrier shall enjoy the right to claim the outstanding amount from the Consignor or Charterer.'

2. In practice, however, storage place in ports is generally booked well in advance (up to one year), so exercising lien on cargo is very difficult."

United Arab Emirates

"There is no statutory provision in the U.A.E. regarding exercise of lien on cargo in the U.A.E. ports for unpaid freight and/or demurrage, but the carrier may obtain an order from the concerned Court for attachment of the cargo and for storing it with any third party until the dues are paid or to sell thereof to recover the dues.

In most U.A.E. ports, storage spaces are available for storing the goods on payment of the prescribed charges.

Retention of cargo owned by the Government or state-owned companies will not be allowed, being against specific enactment and also against public plight."

Venezuela

"In Venezuela the Master delivers the cargo to customs, which, in turn, releases the cargo to the receivers against presentation of the original Bill of Lading, or, if not at hand yet, against a guaranty of the customs broker to present a Bill of Lading within 90 days. That legal status by itself does convey the difficulty of placing a lien in time.

Furthermore, all legal procedures in Court are in Spanish so all documents have to be translated by a public translator, which is another cause for delay. The procedure in Court might

take four to six days and ought to be presented to customs authorities prior to release of the cargo.

Close by to the ports there is currently no storage space available, except, maybe, for cargo suitable for open-air storage.

From experience we may advise that a lien on cargo in Venezuela should not be considered."

Vietnam

"Article 113 of the Vietnamese Maritime Code reads as follows:

1. For securing privileged debts, a creditor is entitled to a statutory lien on the cargo, even if such cargo has been liened, mortgaged or pledged for security of other debts arising from a contract or judicial decision.

2. The privileged debts are settled in the following order:

a) Law costs and costs of judicial execution; expenses incurred in order to preserve, to sell the cargo and to distribute the proceeds of its sale; duties and other public charges.
b) Salvage remuneration falling on the cargo as well as general average contribution due from the cargo;
c) Compensation for damages caused by the cargo;
d) Interests of the carrier.

According to first paragraph of article 115 "maritime liens on cargo extinguish on the delivery of cargo to the legitimate consignee"."

Yemen, Republic of

"We would inform you that Article 189 of the Commercial Law NR 32 for 1991, provides that the carrier may exercise lien on the cargo to obtain freight, expenses and other relative sums due to him in respect of the carriage.

However, we wish to comment as follows:

1. There is no previous legal precedent on this matter to know how long it will take for Court to consider and decide on exercise of lien on cargo.

2. There are not sufficient port sheds for storing the cargoes under lien in big quantities or bulk cargo or direct delivery cargo which mostly consist of foodstuffs, sugar, flour wheat, rice, etc. and which are perishable if stored for a long time...

3. Court will not agree to exercise lien on cargo purchased C&F and CIF and for which the receivers hold Bills of Lading indicating "Freight prepaid" in case of dispute between the owners and charterers on freight/hire matters."

Ship Operational Requirements

General requirements for ships

The world's total fleet of cargo-carrying ships over 100 GT numbers approximately 45,100. Over 90% of all transports, measured in terms of weight, are carried out by ships.

Shipping is probably the most international business in the world and, as such, requires international standards. Such standards, e.g. Conventions, Regulations and Guidelines, are issued by The International Maritime Organization (IMO) in London.

The IMO was established in 1948 as a United Nations special agency for maritime affairs concerning legal matters, ship safety and marine pollution prevention. In this chapter only the two latter will be dealt with.

Within the framework of IMO, matters relating to ship safety are covered by the Maritime Safety Committee (MSC) and its subsidiary sub-committees, whereas marine pollution matters are undertaken by the Marine Environment Protection Committee (MEPC) and its subsidiary sub-committees.

For a ship to be considered "seaworthy", it must, as a minimum, comply with the following mandatory international instruments:

- The International Convention for the Safety of Life at Sea, 1974 (SOLAS)
- The International Convention on Load Lines, 1966 (ICLL)
- The International Convention on Tonnage Measurement of Ships, 1969 (Tonnage)
- The International Convention for the prevention of Pollution from Ships, 1973 (MARPOL 73/78)
- Standards of Training, Certification and Watchkeeping (STCW)

Required documentation

The easiest way to check compliance with the above instruments is to request that the required documentation be produced. Some of the relevant certificates and documents for cargo ships are:

- Cargo Ship Safety Construction Certificate
- Cargo Ship Safety Equipment Certificate
- Cargo Ship Safety Radio Certificate
- International Load Line Certificate
- International Tonnage Certificate
- Certificate of Nationality

- International Oil Pollution Prevention Certificate (IOPP)
- Shipboard Oil Pollution Emergency Plan (SOPEP)
- Individual Certificates for Masters, officers and crew
- Minimum Safe Manning Document
- Intact Stability Booklet
- Certificates from the Classification Society
- Cargo Gear Certificate (ILO)
- Document of compliance with the special requirements for ships carrying dangerous goods
- ISM (SMC and DOC)
- International Ship Security Certificate

A full list of certificates mandated by IMO instruments can be found in Annex II of the latest consolidated edition of SOLAS. All certificates shall be originals. Only under special circumstances, for example during a change of flag, will copies stamped by an Administration be accepted.

This list is not exhaustive. Special ships may be required to carry more certificates and many ships carry "exemption certificates" granting them exemption from certain requirements. ISM Certification is dealt with below.

In particular, attention should be paid to vessels issued with exemption certificates for their Safety Construction Certificate requirement for installation of fixed gas fire-fighting installations in the cargo holds, as such exemption certificates seriously reduce the vessel's range of permitted cargoes. Such vessels can only carry a limited range of permitted cargoes, which are listed and identified on an attachment to the exemption certificate.

The aforementioned certificates and documents are issued by the ship's Flag State or by a company authorised by the Flag State, typically a classification society. Furthermore, ships are required under SOLAS Chapter II-1, Regulation 3-1 to be:

> "... designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society which is recognized by the Administration ..."

Finally, it is recommended that it be verified that the ship in question has hull and machinery insurance and is covered by a P&I Club.

ISM requirements

The International Safety Management (ISM) Code prescribes rules for the safe operation of

ships and for pollution prevention, and for the organisation of a shipping company's management through the development of a Safety Management System (SMS). The Code is mandatory for all ships over 500 GT engaged in international voyages under the appropriate convention (Chapter IX of SOLAS).

Compliance with the ISM Code depends on a certifiable, formal, set of procedures for the maintenance of safe operating practice and a safe working environment, the establishment of safeguards against identified risks, and methods to continuously improve safety management skills aboard ship and ashore. Evidence of compliance with the Code's provisions, proven in a SMS Manual, will be provided through a Document of Compliance (DOC) issued to the company and a Safety Management Certificate (SMC) issued to the ships of the company under the authority of the Flag State. Periodic verification will be carried out by the approved authorities. If a ship is in compliance with the ISM Code, the following information should be noted:

Document of Compliance (DOC)
- issue and expiry dates
- last annual endorsement
- issuing organisation or authority
- company name and address
- vessel type listed

Safety Management Certificate (SMC)
- issue and expiry dates
- intermediate endorsement
- issuing organisation or authority

Latest requirements for tankers and bulk carriers

Due to the large number of tanker and bulk carrier casualties during the last decades, special focus has been placed on these ship-types for some years now. SOLAS has focused on them, and new requirements may be expected to be enforced - often at short notice.

A continuous updating of the various rules which ships shall comply with has to be expected. As an example, IACS has, in 2006, released a set of Common Structural Rules (CSR) as an initiative to ensure that tanker and bulk carrier new buildings are built in compliance with a common set of structural rules. This will eliminate any competition - between IACS members - on the structural strength of tankers and bulk carriers. CSR is expected to create more robust ships in general, but the real benefit will be a reduced exposure to structural breakdowns - also as the vessel gets older.

Compliance with these requirements will in many cases be entered in the existing certificates, such as Load Line, Safe Manning, Safe Construction, etc.

Port State Control

In the years after the Second World War, the world fleet grew rapidly. Competition also increased leading to major changes in the way ship and shore management was conducted.

Sometimes ownership became a diffuse thing, and new Flag States were "invented", providing relaxed taxation compared to the traditional Flag State countries.

However, several of these new exotic Flag States proved to be in no position to enforce the requirements for ships' standards as required by IMO. There were many reasons why a Flag State failed to abide by its obligations but in many cases it simply lacked the experience and manpower held by more traditional Flag State countries.

In some cases, the result was that the Flag State had a large tax revenue compared to expenses and owners saved money and were subjected to a rather lenient inspection regime. This created what was later to be known as Flags of Convenience (FOC's) and sub-standard shipping. The latter expression refers to ships not complying with all the requirements mentioned above under "General requirements for ships".

Contracting parties to the major IMO instruments are required to undertake control of vessels visiting their ports to confirm that these vessels are equipped with the correct and valid certificates. The various MOU's are agreements between states on exactly how they go about exercising this duty.

The inability of some Flag States to ensure that their ships were complying with international standards resulted in a tendency for certain ships of these Flag States to appear more frequently in casualty statistics than their portion of the entire world fleet justified. This led some port states, having launched rescue actions and fought oil pollution from such ships, to establish a Port State Control (PSC) regime, claiming the right to board ships and, in cases of non-compliance with mandatory instruments, fine or detain such ships.

Memoranda of Understanding

Today, PSC officers may be met in almost all ports world-wide. The merits of co-operation in PSC matters have led to the establishment of a number of international or inter-regional agreements concerning PSC. The first of these was established within countries of the European Union and is now known as the Paris Memorandum of Understanding on Port State Control (Paris MOU).

One of the objectives of the MOU is inter-regional co-operation. This should ensure that a ship having been subject to, and successfully passing, a PSC inspection in e.g. Rotterdam is not inspected two day later in Antwerp.

Although the intention of this co-operation is good, reports indicate that the system is by no means perfect as yet. One reason may be that inspection reports are not always entered in the common database right after the inspections have been performed. A passenger ship on its maiden voyage from a European shipyard was inspected in every European port it visited on that first voyage.

Today the following PSC agreements exist:
Paris MOU, covering the EU, Norway, Russia and Canada.
Tokyo MOU, covering the Asia-Pacific Region.
Vinã del Mar, or **Latin America Agreement**, covering South and Central America.

Mediterranean MOU, covering North African countries and Israel, Turkey, Cyprus and Malta.
Caribbean MOU, covering a number of the Caribbean states.
Indian Ocean MOU
Abuja MOU, covering West and Central Africa
Black Sea MOU, covering the Black Sea
Persian Gulf MOU

It is worth noting that the United States is not a party to any MOU. It is, however, an observer at the Paris and Tokyo MOUs and has been granted access to their inspection databases. The US PSC inspection regime is under the purview of the United States Coast Guard (USCG) and is considered to be one of the most rigorous PSC regimes in the world. The system used when targeting ships in US waters is based on a matrix containing information on the owner, flag, class, history (previous detentions) and ship type. Each piece of information is rated with a certain number of points and the total amount of points decides whether the ship is liable to be inspected by PSC. It should be noted that even for a ship achieving zero points, there is no guarantee of not being inspected, merely an indication of greatly reduced likelihood.

The IMO's Sub-Committee on Flag State Implementation (FSI) is monitoring and encouraging this development and the general impression is that these initiatives will, when fully implemented, make it impossible, or at least extremely difficult, to run a sub-standard ship in international trade.

Ballast water management

During the 1990's, a number of port states, or local regions within port states, declared a ban on ships discharging ballast water that has been taken on board in an alien ecological system. The rationale for taking such a step has been the obvious threat of alien species, referred to as harmful aquatic organisms and pathogens, being transferred from their natural surroundings to an "unnatural" environment.

There is little doubt that ecological systems in many places have experienced changes caused by foreign species discharged with ballast water from other areas. There are numerous examples of this, e.g. the introduction of zebra mussels in the Great Lakes (USA/Canada) and mitten crabs in the North Sea area.

Local rules
Several countries have introduced regulations on ballast water management, including some states in the United States and Canada as well as Argentina, Australia, Chile, Israel, New Zealand and Peru.

Ballast water management has been discussed in the IMO for several years and at its Assembly in November 1997, Resolution A.868(20) "Harmful Aquatic Organisms in Ballast Water" was adopted.

This resolution specifically mentions two generally accepted means of managing ballast water, namely ballast water exchange and the flow-through method. Other methods, such as electrical or chemical treatment or heating of the water, have been discussed, but it is generally agreed that only the first two ways mentioned are feasible, and that exchange is the best.

This method means that tanks are emptied in mid-ocean and filled again with non-coastal water. It is also recommended that removal of ballast sediment be carried out in mid-ocean.

The idea of ballast water exchange by the flow-through method is to pump water through the tanks equivalent to three times the tank sizes. This would mean that about 95% of the original water would be exchanged with "new" water. The figure of 95% is, however, rather dependent on the layout of the ballast piping system. The major drawbacks of the flow-through method are that it requires burning tons of fuel to drive the pumps in order to change the enormous amounts of water, extra wear on the ballast pumps, and an upper deck constantly flooded for two or three days. For obvious reasons, this method is not viable when the ship is trading in areas where the prevailing sea and/or air temperature is below 0 degrees C.

The problem with ballast water exchange is that no existing ships were designed for such procedures and thus the safety of the ship may be endangered. Some ships, e.g. bulk carriers, may exceed their strength limits, whereas others may experience stability problems (e.g. Panamax container ships). In such cases, the flow-through system is the only feasible method.

In 2004, the IMO agreed on a new Convention on Ballast Water Management containing the following major elements:

- The convention requires ratification by 30 states representing 35% of the world tonnage to enter into force (as of end 2006, only 6 states representing 0.62% of the world tonnage have ratified the convention);

- Ships are required to have on board an implemented ship-specific Ballast Water Management Plan approved by the Administration. The Ballast Water Management Plan must include a detailed description of the Ballast Water Management Requirements and the Ballast Water Management Procedures;

- Ships must have a Ballast Water Record Book (similar to the Oil Record Book used in the MARPOL 73/78 regime) for recording all ballast water operations such as ballast water uptake, circulation or treatment for Ballast Water Management purposes, discharges into the sea or to a reception facility and accidental or other exceptional discharges of ballast water.

Ballast Water Management for Ships

- Ships constructed before 2009 with ballast water capacities of between 1,500 and 5,000 cubic metres shall, as a minimum, conduct ballast water management that meets the ballast water exchange standards or the ballast water performance standards until 2014, after which time they shall at least meet the ballast water performance standard.

- Ships constructed before 2009 with ballast water capacities of less than 1,500 or greater than 5,000 cubic metres must, as a minimum, conduct ballast water management that meets the ballast water exchange standards or the ballast water performance standards until 2016, after which time they shall at least meet the ballast water performance standard.

- Ships constructed in or after 2009 with ballast water capacities of less than 5,000 cubic metres must conduct ballast water management that at least meets the ballast water performance standard.

- Ships constructed in or after 2009 but before 2012, with ballast water capacities of 5,000 cubic metres or more shall conduct ballast water management that at least meets the ballast water performance standard.

- Ships constructed in or after 2012, with ballast water capacities of 5,000 cubic metres or more shall conduct ballast water management that at least meets the ballast water performance standard.

The Convention contains a Ballast Eater Exchange Standard and a Ballast Water Performance Standard:

Ballast Water Exchange Standard - Ships performing ballast water exchange shall do so with an efficiency of 95% volumetric exchange of ballast water. For ships exchanging ballast water using the pumping-through method, pumping through three times the volume of each ballast water tank shall be considered to meet the standard described. Pumping through less than three times the volume may be accepted, provided the ship can demonstrate that at least 95% volumetric exchange is met.

Ballast Water Performance Standard - Ships conducting ballast water management shall discharge less than 10 viable organisms per cubic metre greater than or equal to 50 micrometres in minimum dimension and less than 10 viable organisms per millilitre less than 50 micrometres in minimum dimension and greater than or equal to 10 micrometres in minimum dimension; and discharge of the indicator microbes shall not exceed a set of specified concentrations.

Ballast Water Management systems must be approved by the Administration in accordance with IMO Guidelines.

The Convention allows port states to implement more stringent measures, individually or jointly with other port states, with respect to the prevention, reduction or elimination of the transfer of harmful aquatic organisms and pathogens through the control and management of ships' ballast water and sediments.

Ships are required to be surveyed and certified and may be inspected by port state control officers for verification of a valid Ballast Water Management Certificate, inspection of the Ballast Water Record Book and/or samples of ballast water. All possible efforts shall be made to avoid a ship being unduly detained or delayed.

Contracting parties are to ensure that where cleaning or repair of ballast tanks occurs, ports and terminals have adequate reception facilities for the reception of sediments.

BIMCO has compiled a global database on ballast water management regulations and information from more than 100 countries is available. The global ballast water management database is available on BIMCO's Homepage on the Internet (http://www.bimco.org).

Heavy fuel oil

The MARPOL Annex VI entered into force in 2005. The regulations in this annex set limits on sulphur oxide and nitrogen oxide emissions from ship exhausts and prohibit deliberate

emissions of ozone depleting substances. It will, among other things, require that the sulphur content of fuel burned in ships is maximum 4.5% globally and 1.5% inside SOx Emission Control Areas (SECA's). At present, the only approved SECA is the Baltic and North Seas.

The EU requirements under directive 1999/32 go a step further. In addition to the SECA's, they require passenger (ferries) to apply the same 1.5% sulphur content limit from 1 July 2007, and the directive requires a maximum 0.1% sulphur content in fuel burned in port during stays over 2 hours as from 2010, with 2 years extra derogation for 16 specifically named Greek ferries.

It should be noted that Annex VI is subject to considerable attention from legislators, and not least the public. Stricter local or regional requirements may consequently be enforced.

The BIMCO website (www.bimco.org) provides notice of any such more stringent requirements.

Special cargoes

Dangerous cargoes

Of the more than 4,200 million tonnes of cargo being transported by sea every year, a significant part is considered to contain properties which may be hazardous to the ship, the crew or the environment. Such cargoes are listed in the IMO booklet "International Maritime Dangerous Goods (IMDG) Code".

For many years, the **IMDG Code** has been a practical guideline, appreciated and accepted by the shipping industry and most dangerous cargoes have been loaded, transported and unloaded in accordance with this Code. The Code was made mandatory from January 2004.

The IMDG Code is divided into nine chapters according to the properties of the cargoes. Special requirements for the cargo as well as instructions as how to separate the cargo from other dangerous cargoes, are set out in the Code. The Code also contains a Medical First Aid Guide (MFAG), packing and labelling instructions, and Emergency Procedures (EmS).

The Code of Practice for Solid Bulk Cargoes, known as the **BC Code**, contains information on a large number of cargoes usually carried in bulk. Some of these cargoes are considered as "Materials Hazardous only in Bulk" (MHB), for example materials being liable to reduce the oxygen content or liable to self-heating. Other materials may liquefy or emit flammable gases. The transport of Irradiated Nuclear Fuels is covered by the **INF Code**, dealing with civil transport of nuclear materials. The INF Code became mandatory on 1 January 2001.

Part A of Chapter VI, of the IMO's International Convention for the Safety of Life at Sea, 1974 (SOLAS), entitled "Carriage of Cargoes" contains some general provisions on the carriage of cargoes, shippers obligations to provide all relevant information on the cargoes, use of pesticides in ships, and requirements for cargo stowage and securing. Part B contains some special provisions for bulk cargoes (other than grain) whereas Part C is the **"International Grain Code"**, dealing with the carriage of all grain and grain-like cargoes.

Chapter VII of SOLAS concerns the "Carriage of Dangerous Goods", giving due reference to the IMDG Code.

Project cargoes
Project cargoes are regularly carried by general cargo ships and bulk carriers although specialised vessels for these cargoes exist. Project cargoes are often very voluminous and heavy and often require a floating crane for loading and discharging. On container vessels, all cargo which is not containerised is considered project cargo.

Typical project cargoes are modules for the off-shore industry or for land based industries, gantry cranes and smaller (coastal) vessels. Great skill is required to handle such cargoes and it is recommended that the ship's classification society is contacted for approval of the loading and lashing/securing. Securing of project cargo is often done simply by welding the cargo to the ship's structure, and in such cases the classification society must be contacted.

Cargo Securing Manual

Since 1 January 1998, all cargoes other than liquid and solid bulk cargoes shall be secured in accordance with an approved Cargo Securing Manual. Special considerations may be given in case of project cargo, as mentioned above.

BIMCO databases

On BIMCO's Internet Home Page (http://www.bimco.org), Members Area, under General Web Service, a database on the most common solid bulk cargoes may be accessed. Information available covers cargo properties, hold cleaning requirements both prior to loading and after discharge, loading restrictions, etc.

Another BIMCO database holding information that could prove important to the shipowner/captain is the "Bulk Terminal Reports", which are found under BIMCO Electronic Shipping Manuals. In order to provide information for the development of IMO's *Code of Practice for the Safe Loading and Unloading of Bulk Carriers*, the so-called BLU-Code, an investigation was undertaken by BIMCO in co-operation with other shipping organisations.

The objective of this investigation was to examine the relationship between bulk carriers and bulk terminals. Incorrect loading/unloading of bulk carriers was perceived to be one of the causes of the many bulk carrier losses. The result of the investigation was vital for the development of the above-mentioned Code. However, the reports were considered to hold so much useful information that it was decided to enter the information in a database.

Maritime Security

In the aftermath of the terrorist attacks against the United States on 11 September 2001, attention to Maritime Security reached never before seen levels of intensity. Ultimately this lead to the implementation of the SOLAS International Ship and Port Facility Security Code (ISPS) and other security-related amendments to the SOLAS Convention.

Whilst acts of terrorism created the political momentum to establish such regulations, ships remain vulnerable to acts of piracy, armed robbery, drug smuggling and stowaway boardings. This chapter is intended to provide practical advice relating to the consequences created by these activities and the new regulations.

Practical advantages of the ISPS Code

The security related amendments made to the SOLAS Convention and the SOLAS ISPS Code establish mandatory measures aimed at improving the security of ships and port facilities to better protect them from all sorts of threats, both the traditional threats and the more recent political threats. Perhaps the single-most significant aspect of the new requirements is that all port facilities serving ships in international trades must implement measures to establish security and thereby prevent unauthorised persons from gaining access to ships and their cargoes. Previously the only binding regulation placing such responsibility on the ports was found in the Facilitation Convention, calling on Contracting Governments to establish security arrangements for the purpose of preventing persons attempting to stow away on board ships from gaining access to port installations and to ships … in all their ports (1) Surely the new SOLAS requirements will be enforced with more vigour than was seen with the stipulations of the Facilitation Convention.

Ship security plans outline the security duties for all crew. The plan will also outline the steps to take in response to various given situations. This section is not intended to override anything contained in the ship security plan, but rather to highlight certain advantages that should be available provided that the port facilities your ship is trading to have effectively implemented the stipulations required in SOLAS and the ISPS Code.

Extracts from SOLAS and the ISPS Code that illustrate some of the points addressed in this section, as well as other useful references pertaining to the responsibilities of port facilities can be found in the following section, “SOLAS Security amendments and the ISPS Code”.

The Port Facility Security Officer (PFSO)

Clearly the PFSO is the Ship Security Officer’s (SSO’s) primary contact for determining the security level, arranging Declarations of Security when required, and other related security information, but there are additional functions that the PFSO can perform to assist ships.

Amendments to SOLAS now found in Chapter XI-2, Regulation 8, empower the Master to deny access of persons to his ship, except for authorised government personnel. It is, however, not uncommon for persons to attempt to board ships posing as port officials.

As from 1 July 2004, all persons seeking to board ships must present identification to satisfy the Master, or the person assigned by him or by the SSO to check the identification of persons seeking to board the ship, that they are authorised to do so. Although it is not the intention of the code to burden the PFSO with assisting in verifying the identification of

every port official seeking to board ships, PFSOs are obligated to render such assistance to SSOs in cases where suspicions arise as to the authenticity of identity documents of persons claiming to be port officials.

The Port Agent
The ISPS Code does not stipulate new duties for the Port Agents; however, Port Agents should be prepared to assist arriving ships and their respective Ship Security Officers (SSOs) with a number of security-related issues.

The SSO will need to coordinate various activities with the PFSO. The Port Agent should therefore maintain an updated list of all the PFSOs at the port and their complete contact details in order to assist SSOs in establishing contact with the PFSOs. In addition to maintaining the contact details for PFSOs at the port, the Port Agent should also strive to ensure that arriving ships are aware of the security levels at the port facilities at which they will operate.

Port State Security Controls
Controls will naturally be conducted by Port State inspectors seeking to verify compliance. One should expect that whilst certain Coastal States may pursue such controls more aggressively than others, in order to avoid possible delays and detentions it is be important to avoid providing Port State Security Control (PSSC) inspectors with any "clear grounds" that indicate non-compliance with the ISPS Code. "Clear grounds" could take several shapes and forms, but there are certain obvious circumstances which will definitely lead PSSC inspectors to execute thorough controls that could lead to delays and detentions.

If PSSC inspectors are able to board a ship without any identity checks at the gangway, it will be clear that no measures are in place to prohibit unauthorised access. PSSC inspectors might randomly ask crew members to describe their security duties under the Ship Security Plan. Should any members of the crew not be able to describe their security duties PSSC inspectors would assume that the Ship Security Officer has failed to establish awareness amongst the crew of their duties. Circumstances such as these and others (for example; no IMO number permanently marked on the ship) would be considered as "clear grounds" that the ship is non-compliant.

SOLAS Security amendments and the ISPS Code

As mentioned in the previous section, here you will find extracts taken from the SOLAS Convention and the ISPS Code that may prove useful in certain situations as security-related challenges arise at ports. It should be borne in mind that the procedures as set out in the Ship Security Plan should always prevail when applicable. This section is in no way meant to replace or override anything contained in Ship Security Plans, but rather the intention is to provide additional insights and referenced that can quickly be cited should the need arise.

The full SOLAS ISPS Code can be purchased from IMO Publications.

Master's discretion
Should problems arise with respect to the reluctance of persons claiming to be port officials who refuse to produce identity documentation at the gangway, or if suspicions should arise with respect to the authenticity of such documentation, the following extracts may be useful:

SOLAS CHAPTER XI-2
SPECIAL MEASURES TO ENHANCE MARITIME SECURITY
Regulation 8
Master's discretion for ship safety and security
1 The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgement of the master, is necessary to maintain the safety and security of the ship. This includes denial of access to persons (except those identified as duly authorized by a Contracting Government) or their effects and refusal to load cargo, including containers or other closed cargo transport units.

ISPS Code Part A (1)
17 PORT SECURITY OFFICER
17.2 In addition to those specified elsewhere in this Part of the Code, the duties and responsibilities of the port facility security officer shall include, but are not limited to:

.13 assisting ship security officers in confirming the identity of those seeking to board the ship when requested.

ISPS Code Part B (2)
4 RESPONSIBILITIES OF CONTRACTING GOVERNMENTS
Identification documents
4.18 Contracting Governments are encouraged to issue appropriate identification documents to Government officials entitled to board ships or enter port facilities when performing their official duties and to establish procedures whereby the authenticity of such documents might be verified.

ISPS Code Part B (2)
9 SHIP SECURITY PLAN
Access to the ship
9.12 Those unwilling or unable to establish their identity and/or to confirm the purpose of their visit when requested to do so should be denied access to the ship and their attempt to obtain access should be reported, as appropriate, to the SSOs, the CSOs, the Port Facility Security Officer (PFSO) and to the national or local authorities with security responsibilities.

ISPS Code Part B (2)
17 PORT FACILITY OFFICER
17.1 In those exceptional instances where the ship security officer has questions about the validity of identification documents of those seeking to board the ship for official purposes, the port facility security officer should assist.

Shore leave
Heightened security measures at some ports has had the unfortunate result of creating difficulties for seafarers seeking shore leave. When confronted by such situations one option may be to request an explanation of the procedures required by this section of the ISPS Code:

ISPS Code Part A (1)
16 PORT FACILITY SECURITY PLAN
16.3 Such a plan shall be developed taking into account the guidance given in part B of this

Code and shall be in the working language of the port facility. The plan shall address, at least, the following:

.15 procedures for facilitating shore leave for ship's personnel or personnel changes, as well as access of visitors to the ship including representatives of seafarers. welfare and labour organizations.

When faced with the difficulties described above it may be advisable for the Master or SSO to consult with the CSO or the ship's P&I Club prior to confronting port authorities with the text of the regulations that has been quoted, however in doing so references to the relevant regulations may be advantageous.

Footnotes

(1) Mandatory requirements regarding the provisions of Chapter XI-2 of the International Convention for the Safety of Life at Sea, 1974, as amended.

(2) Guidance regarding the provisions of Chapter XI-2 of the Annex to the International Convention for the Safety of Life at Sea, 1974 as amended and part a of this Code.

Is the port facility ISPS-compliant?

Quite naturally the question as to whether or not specific port facilities are ISPS-compliant will arise with increased frequency, creating a new challenge in determining the ISPS-status of port facilities.

Presently there appears to be no comprehensive list available of ISPS-approved port facilities. There are, however, a few options that may be of assistance on a case-by-case basis.

IMO ISPS Code database

One could describe one database as the "official" source regarding ISPS-approved port facilities, namely the IMO web site.

The URL is: www.imo.org

On the IMO main page is the link: MARITIME SECURITY

That link leads to the ISPS Code database. This area is open to the public when using the "Public log in" and choosing the country where the port facility being investigated is situated.

After choosing the public log in for the country in question, choose Ports and Port Facilities. This will provide you with a list of the facilities that country has entered into the IMO ISPS database. The next step is to choose the facility you are investigating to see whether or not it is ISPS approved.

In addition to the ISPS status of port facilities, users should also be able to obtain the details for:

- National authorities responsible for ship security
- National authorities responsible for port facility security

- Proper recipients of SSAS alerts
- Proper recipients of maritime security related communications from other contracting governments
- Proper recipients of requests for assistance with security incidents
- Names of recognized security organization (RSOs) approved by the state

The BIMCO Website
BIMCO has made an effort to obtain ISPS-related information for inclusion in the Ports section of our website. BIMCO's port information suppliers around the world were asked to confirm whether or not the ISPS Port Facility Security Plans for the facilities at their port are approved, and to provide the security information applicable to the facilities (such as Port Facility Security Officers' contact details).

Some information has been obtained for many ports and can be found under the heading: Port Facility Security under the ports for which such information has been provided. If no information can be found via these means one could also enquire directly via port agents, port facility security officers or harbour masters, as well as via enquires to the BIMCO Secretariat.

IMO advice for ships trading to port facilities that are not compliant with the ISPS Code
Whilst concerns prior to entry into force of the SOLAS ISPS Code on 1 July 2004 weighed heavily on the abilities of ships to obtain certification (concerns which now appear to have been largely unfounded), it is clear that some port facilities remain non-compliant with the ISPS Code.

The natural result of this are new concerns as to the precautions that ships trading to non-compliant port facilities should take.

The first thing to remember is the technical fact that it is not a question as to whether the 'port' is ISPS compliant, but rather whether the 'port facility' that the ship will 'interface' with has an approved 'Port Facility Security Plan'.

The IMO has approved the following guidance for ships trading to port facilities that are not in compliance with the ISPS Code (the title also mentions steps that port facilities should take, however these steps are not reproduced here). It was recognised that many Ship Security Plans already address the measures to take in such situations, and it is therefore emphasized that in such cases the stipulations of the Ship Security Plans should prevail.:

IMO GUIDANCE RELATING TO THE IMPLEMENTATION OF SOLAS CHAPTER XI-2 AND THE ISPS CODE

"GENERAL
1 The ensuing paragraphs are lifted from the report of the Maritime Security Working Group at MSC 78 and are considered to be of valuable guidance for the implementation of SOLAS chapter XI-2 and the ISPS Code on relevant topics.

SECURITY MEASURES AND PROCEDURES TO BE APPLIED DURING SHIP/PORT INTERFACE WHEN EITHER THE SHIP OR THE PORT FACILITY DO NOT COMPLY WITH THE REQUIREMENTS OF SOLAS CHAPTER XI-2 AND OF THE ISPS CODE

Ships

2 The Committee considered the security measures and procedures to be applied during ship/port interface when either the ship or the port facility do not comply with the requirements of (SOLAS) chapter XI-2 and of the ISPS Code.

3 The Committee recalled paragraph B/9.51 of the ISPS Code which recommends that the ship security plan (SSP) should establish details of the procedures and security measures the ship should apply when:

.1 it is at a port of a State which is not a Contracting Government;

.2 it is interfacing with a ship to which the ISPS Code does not apply;

.3 it is interfacing with a fixed or floating platform or a mobile drilling unit on location; or

.4 it is interfacing with a port or port facility which is not required to comply with chapter XI-2 and part A of the ISPS Code;

and thus considers that guidance, in this respect, is only required for those ships which have not already included appropriate provisions to this end in the approved SSP.

4 The Committee decided to recommend that in such cases, if the ship's approved SSP does not already include provisions as recommended in paragraph B/9.51 of the ISPS Code, the ship should attempt to conclude, if possible, a Declaration of Security or to take the following action:

.1 record the actions taken by the Company Security Officer (CSO) and/or Ship Security Officer (SSO) to establish contact with the Port Facility Security Officer

.2 record the security measures and procedures put in place by the ship, bearing in mind the security level set by the Administration and any other available security-related information; and complete and sign, on behalf of the ship alone, a Declaration of Security;

.3 implement and maintain the security measures and procedures set out in the Declaration of Security throughout the duration of the interface;

.4 report the actions taken to the CSO and through the CSO to the Administration; and

.5 request the CSO to inform the authorities responsible for the exercise of control and compliance measures (regulation XI-2/9) and the PFSO(s) at the next port(s) of call of the difficulties the ship experienced and of the actions the ship itself took.

5 The Committee recognized that a ship should be able to address most of the ship security activities required by section A/7 of the ISPS Code.

6 In addition the Committee recognized that on certain occasions and, in particular, when a ship is required to call at a port of a State which is not a Contracting Government, the ship may be unable to identify the person responsible for the security of that port or to conclude with such a person a Declaration of Security.

Security concerns

7 The Committee also considered the case where a ship has concerns about the security of a port facility, which is supposed to operate in accordance with an approved Port Facility Security Plan (PFSP).

8 In this respect the Committee decided to draw the attention to the fact that certain of the security measures may be of a covert nature and may not be easily identified. Thus, the Committee recommended that the ship, as a first step, should contact the PFSO and discuss the matter.

9 The Committee recalled the provisions of paragraph B/4.16 of the ISPS Code and recommends that the procedure referred therein should be followed. If no remedial action is agreed between the Contracting Governments concerned, the Committee recommends that the ship, in the absence of any specific provisions to this end in the ship's approved SSP, may either request a Declaration of Security or should follow the steps outlined in paragraph 3.1 to 3.4 above."

By following the measures described in the SSP or the IMO guidance above, the ship should be able to minimize possible delays at subsequent ports as there will be evidence showing that all efforts were made to maintain the integrity of the ship's security whilst at the non-compliant port facility.

US Coast Guard advice for ships trading to port facilities that are not compliant with the ISPS Code

USCG Navigation and Vessel Inspection Circular (NVIC) No. 06-03 (Change 1), reads as follows: "If the vessel has arrived from a non-compliant port, determine the security level that the vessel maintained at that port. If the vessel did not maintain at least security level 2, additional PSC measures should be considered as outlined in Enclosure 4 of this NVIC."

This text could gives the impression that the USCG wants to see ships automatically going to MARSEC 2 in such circumstances.

According to a subsequent USCG advisory, if vessels trading to non-compliant ports take the four recommended steps outlined below, the vessels' security postures will be considered and reflected in the location, scope, intensity and duration of the Port State Control measures.

1. Set a higher security level;
2. Execute a Declaration of Security;
3. Log all security actions in the ship's log; and
4. Report the actions taken directly to the cognizant US Coast Guard Captain of the Port prior to arrival.

US Port State Control officers will verify whether these recommended additional security measures, such as going to MARSEC 2, were implemented.

US Coast Guard clarifies ISPS & MTSA questions

BIMCO has regularly sought to obtain clarifications on USCG policies relating to the ISPS Code and the Maritime Transport Security Act (MTSA) as such concerns arise. It is not uncommon that the MTSA is considered as a body of regulations imposed at US ports over and

above the ISPS Code, but in fact the MTSA is the national legislation enforcing the ISPS Code. In practice ships trading to US ports on international voyages that hold International Ship Security Certificates certifying the ships' compliance with the ISPS Code will not face additional requirements emanating from the MTSA. Any security-related delays, detainments or penalties would be related to non-compliance with the ISPS Code.

Recordkeeping

During an ISPS informative meeting and discussion sponsored by the Danish Shipbrokers' Association, questions arose as to how long ships must maintain records regarding ports of call. Here some felt that as MTSA required ships to keep records of calls at ports covering a two-year period, far exceeding the IMO requirement of 10 previous port calls, ships trading to US ports would be well advised to apply the MTSA approach.

The USCG explained that the two-year requirement for maintaining some records is an MTSA requirement (33 CFR 104.235). It does not apply to maintaining copies of Declarations of Security (DoSs). The MTSA regulations require a vessel to maintain copies of the last 10 DoSs and a copy of any continuing DoS until at least 90 days after the end of its effective period. The two-year requirement applies to training, drills and exercises, security incidents, MARSEC level changes, security equipment maintenance, calibration & testing, security threats, and annual VSP audit information records.

The MTSA regulations also state in 33 CFR 104.105 (c) that foreign vessels with a valid ISSC are deemed to be in compliance with all of the MTSA vessel requirements except parts 104.240 (MARSEC Level Coordination), 104.255 (DOS Requirements – the USCG require a DOS in more situations), 104.292 (Additional Requirements - Passenger Vessels & Ferries) and 104.295 (Additional Requirements - Cruise Ships), compliance with the ISPS documentation and record-keeping requirements are all that is required.

USCG advice to avoid ANOA problems

Some ships have experienced delays at US ports in connection with the Advance Notice of Arrival (ANOA) requirements. Some of these problems have arisen from failures to submit the required information 96 hours prior to arrival at US ports, sometimes due to problems with e-mail transmissions of information.

In an effort to assist members to avoid such problems the US Coast Guard (USCG) has asked BIMCO to provide the following advice to its members:

Seeking to allow for maximum flexibility for the maritime industry, the USCG has made several options available for the submission of the ANOA reports. Whilst one of the options is the e-mail ANOA system, this currently presents a shortcoming in that there is no confirmation number given when submissions are made via this means. For this reason the USCG has been encouraging vessels and agents to submit ANOAs via the National Vessel Movement Center's site; www.nvmc.uscg.gov Here users are given a confirmation that the ANOA was received. Furthermore, users can contact the NVMC to verify receipt of the ANOA using either the NVMC toll free number 1 800 708 9822 or the main number: 1 304 264 2502

Submission of ANOA information 96 hours prior to arrival is required as the information is shared and analysed by many agencies within the US government, not only by the USCG. In

this way they seek to prevent potential terrorist threats whilst protecting the free movement of legitimate trade.

It should also be borne in mind that ANOA information can be submitted long before the 96-hour deadline - therefore there is no reason to wait until the last minute to make the submission. Some ships that have faced such delays have entered appeals seeking permission to berth before 96 hours have elapsed, however no appeals have been granted in any of these cases. The USCG emphasises that the advance notice of arrival (ANOA) is an extremely important tool in combating terrorism. Whilst the USCG is painfully aware of instances where commerce is impacted because of such requirements, it must be remembered that the security and safety of US ports are top USCG concerns. At the same time the USCG is committed to working with its industry partners to keep impacts to commerce at a minimum while insuring the safety and security of US ports.

USCG direct assistance
The USCG wants the maritime community to know what they will be looking for with respect to security requirements, including how the USCG will be looking for non-compliance and potential consequences of non-compliance. Questions relating to USCG policy can be sent to the MTSA Helpdesk at: uscgregs@comdt.uscg.mil

For further details on USCG policies are also available from the link to Navigation and Vessel Inspection Circular 06-03, Port State Control Targeting and Boarding Policy for Safety and Security: http://www.uscg.mil/hq/g-m/mp/nvic.html

From this link there is also other MTSA and ISPS related policy information including Policy Letters, Policy Advisory Council Decisions and Frequently Asked Questions.

Security guards

At some ports situations may arise in which armed security guards are required. Both the PFSOs and the Port Agents should be able to inform the SSO of security contractors at the port that are authorized to guard ships and that are also trained to ensure awareness of the consequences that could arise if their firearms are used in the close vicinity of dangerous cargoes.

The following extract from the ISPS Code may be useful in such situations:

ISPS Code Part B ([2])
16 PORT FACILITY SECURITY PLAN
16.7 The use of firearms on or near ships and in port facilities may pose particular and significant safety risks, in particular in connection with certain dangerous or hazardous substances and should be considered very carefully. In the event that a Contracting Government decides that it is necessary to use armed personnel in these areas, that Contracting Government should ensure that these personnel are duly authorized and trained in the use of their weapons and that they are aware of the specific risks to safety that are present in these areas. If a Contracting Government authorizes the use of firearms they should issue specific safety guidelines on their use. The PFSP should contain specific guidance on this matter in particular with regard its application to ships carrying dangerous goods or hazardous substances.

Note
(2) Guidance regarding the provisions of Chapter XI-2 of the Annex to the International Convention for the Safety of Life at Sea, 1974 as amended and part a of this Code.

Costs related to security guards
In view of the increased security requirements, notably in the United States, the Secretariat is fairly often confronted with the question of costs of security guards, which may be imposed by the local authorities because some crew members may be unable to obtain crew visas or, because the owners have resolved not to apply for crew visas.

It is sometimes argued that this question is dealt with within the ISPS convention. This is not, however, the case. There is nothing in the ISPS convention which requires that in the event that the crew is of a certain nationality, the ensuing costs of hiring security guards as may be required by the local authority must be defrayed by the owners.

Another argument put forward is that since the guards are ordered by the local authority because the crew either does not possess crew visas and/or is of a certain nationality, this is an owners' matter falling within, for instance, Clause 6 of the NYPE 93.

As far as BIMCO is concerned, the starting point must be that the vessel is in a contractual state and maintained in a fit and seaworthy condition. This implies, *inter alia*, that the vessel has on board a competent crew capable of coping with the duties and holding valid certificates as may be required for the particular crew members to fulfil their respective tasks. The nationality of the crew was never a factor in deciding whether a particular crew member may be competent, and the fact that owners employ crew of certain nationalities cannot be relevant as long as the particular crew members discharge their duties in a competent and professional manner.

It should be kept in mind that ships are not immobilised because of the lack of visas or of crew being of a certain nationality. There are, however, restrictions imposed on the crew (which is a problem in itself), but since the vessel is allowed to work even if guards have to be employed and as long as the vessel is seaworthy, in a contractual state, the orders of the port that security guards should be employed must fall within the port expenses commonly to be defrayed by the time charterers. (Readers are referred to summary of a London arbitration award, which appeared in *BIMCO Bulletin 2/04*.)

Security Clauses

BIMCO has established and approved several clauses to address security-related concerns. Following is advice related to several of these clauses. The full texts of the clauses addressed below themselves are available in the BIMCO publication "Forms of approved documents" and on the BIMCO web site, where additional clauses addressing stowaways and drug smuggling can also be found.

BIMCO ISPS/MTSA Clauses for Time and Voyage Charter Parties
Amongst the measures imposed by the ISPS Code and the US Marine Transport Security Act 2002 (MTSA) are requirements which ship owners can only meet with the co-operation of the charterers, such as providing information about the full style contact details of the charterers

and any sub-charterers. Furthermore, delays, costs and expenses may be incurred in connection with security measures taken by the local port authorities or other relevant authority according to the MTSA and/or ISPS Code; the burden of which must be borne by the owners or the charterers or shared between them.

BIMCO receives many enquiries from members concerning the possible need for special clauses to cover the charter party related implications of the ISPS Code and/or MTSA. To meet this concern, BIMCO's Documentary Committee revised the ISPS Clause for Time Charter Parties and Voyage Charter Parties, the revised clauses are now referred to as ISPS/MTSA Clause for Time Charter Parties 2005 and ISPS/MTSA Clause for Voyage Charter Parties 2005.

The general comments below on clause paragraphs (a) and (b) applies to the Time Charter Party clause as well as the Voyage Charter Party clause.

Clause (a) sets out that for the duration of the charter party, the owners will comply with the requirements of the ISPS Code and US Marine Transportation Security Act 2002 (MTSA) NOTE: where the vessel's trade does not take it to the US, the provisions relating to MTSA will not apply. The owners are also required to provide to the charterers, documentary evidence of their compliance if requested. Basically, this part of the clause forms the "comfort" element as such requirements are mandatory under the amended SOLAS Convention.

Additionally, Clause (a) puts an obligation on the owners to provide the charterers with the full style contact details of the Company Security Officer (CSO). The CSO will be the designated person from the company responsible for the actual operation of the vessel. Finally, Clause (a)(ii) stipulates that the owners will be accountable for their failure to comply with the requirements of the ISPS Code and MTSA.

Clause (b) addresses the charterers' obligations to provide the owners with their full style contact details and those of any sub-charterers. This reflects the requirements under the ISPS Code and MTSA for the owners to obtain such information. Clause (b)(ii) is the reciprocal provisions to Clause (a)(ii) whereby the charterers shall be accountable for failure to comply with the provisions of Clause (b). It should be noted that both Clauses (a)(ii) and (b)(ii) explicitly excludes liability for consequential loss. This is done to protect the parties against responsibility for consequential losses in the event that the charter party is silent on this matter.

Clause (c) in the Time Charter Party clause offers a balanced solution to the issues of delays, costs and expenses arising out of or related to security regulations or measures required to comply with the ISPS Code and/or MTSA. The first part of the Clause provides that all delays, costs or expenses arising out of security measures taken by the port facilities or other relevant authority (as it is possible that security measures may be called for by authorities other than the port facility) in accordance with the ISPS Code and/or MTSA will be for the charterers' account. This requirement is irrespective of the security level imposed in the particular port or ports. The second part of the Clause addresses the owners' liabilities and makes it clear that the owners are accountable for all measures taken to comply with the Ship Security Plan (at Security Levels 1, 2 and 3). Thus, where the owners are required under their Ship Security Plan to use two guards at the gangway, even though the port security regulations may require only one guard, such costs will be borne by the owners. The cost of preparing and implementing a Ship Security Plan for Levels 1, 2 and 3 are for the owners' account.

Clause (c) does not address the issue of the vessel's trading history and this is deliberate - if the owners have complied with the ISPS Code and/or MTSA even though the vessel has during the previous 10 voyages called at an unlisted or insecure port, then the risk rests with the charterers during the currency of the contracted voyage. BIMCO is of the view that a prudent time charterer will request details of the vessel's last 10 voyages prior to fixing and then make a commercial decision on that basis. Certainly the owners should not be penalised where they have remained in full compliance with the ISPS Code and/or MTSA

The Voyage Charter Party clause, Clause (c) deals with delays to the vessel caused by events other than those attributable to the owners' non-compliance with the Code. In Clause (c)(i) the vessel is entitled to tender Notice of Readiness if ready in all respects other than awaiting clearance due to ISPS or MTSA related security measures imposed by a port facility or other relevant authority. The text in Clause (c)(ii) of the Voyage Charter Party Clause was changed in June 2005 to provide that delay will only count as laytime or time on demurrage "unless such measures result solely from the negligence of the Owners, Master or crew or the previous trading of the Vessel, the nationality of the crew or the identity of the Owner's managers". The exception from laytime of delays due to the vessel's previous trading, crew nationality or identity of ship managers has been introduced to reflect the owners' responsibility for ship management and the commercial operation of the vessel in terms of the likely impact on compliance with port security measures at the ports where the owners have contractually agreed for the vessel to trade to.

Clause (d) in the Voyage Charter Party clause deals with costs and expenses in the same manner as under Clause (c) in the Time Charter Party clause.

Finally, Clause (d) in the Time Charter Party clause and Clause (e) in the Voyage Charter Party clause contain an indemnity provision that secures that payments made in respect of the Clause will be covered by the responsible party under the Clause.

It is important to note that the ISPS/MTSA Clauses do not conflict with the incorporation of BIMCO's War Risks Clause, CONWARTIME 1993 or VOYWAR 1993. The decision to call or not to call at a particular port exposed to defined war risks (which includes acts of terrorists) is regulated by these clauses. However, once the decision is made to call at a port, the ISPS/MTSA Clauses will take effect.

U.S. Customs-Trade Partnership Against Terrorism (C-TPAT) Clause Dec. 2004

The "U.S. Customs-Trade Partnership Against Terrorism (C-TPAT) Clause", was drafted to take into consideration the situation where the charterers have voluntarily signed the C-TPAT Agreement, but the owners have not. Owners who wish to help the charterers comply with their obligations under the C-TPAT Agreement may use the Clause, although they are not legally bound to do so.

(For more information on the C-TPAT Agreement, please refer to the US Customs website: www.customs.ustreas.gov/enforcem/tpat.htm)

Terrorism, piracy, armed robbery, stowaways & drug smuggling

Members may obtain guidance from BIMCO relating to all of these security risks. The BIMCO

ShipMaster's Security Manual provides practical advice, related IMO guidance as well as other reference material relating to preventive actions as well as post-event actions. This advice is also available in the Security section of the BIMCO Website, and ongoing developments are reported in the BIMCO News and Bulletin.

Members may also consult with the BIMCO Secretariat for advice and guidance on a case by case basis.

With resoect to stowaways, there have been cases in which BIMCO has assisted P&I Clubs in securing the repatriation of stowaways when local authorities have refused to allow the disembarkation of stowaways. BIMCO members facing such difficulties may approach the BIMCO Services Department for assistance.

In order to enable BIMCO to represent the industry with respect to such issues, it is important for members to inform the Secretariat of related incidents involving their ships. Reporting forms designed for this purpose are available on the BIMCO Website and in the BIMCO *ShipMaster's Security Manual*.

Owners can also participate in government-sanctioned programmes to fight drug smuggling. The customs authorities of the United States and 14 other countries in Europe and North America have established anti-drug smuggling programmes such as the Sea Carriers' Initiative Agreement (SCIA) and Customs Co-operation Agreements (CCA's), previously know as Memoranda of Understanding (MOU's) respectively. These programmes establish co-operation between customs and owners in fighting the war on drugs, under which owners agree to guidelines and procedures aimed at reducing their vessels' vulnerability to drug smugglers by:

- Using all appropriate means to discourage offenders of Customs laws, in particular drug traffickers, from using the vessel, its services or facilities

- Exercising effective control over access to their facilities and equipment

- Seeking Customs' advice and assistance to assess the vulnerability of their facilities and develop specific plans to minimise such vulnerability, and

- Taking all reasonable precautions to check the background and integrity of any potential staff member

Although the CCA's are not legal documents and cannot be enforced in any court of law, they represent formal recognition of the need for co-operation. The MOU's not only contain guidance as to what the carrier should do, but also the clear obligation for the Customs Authorities to work closely with the ship owner.

Ship owners are therefore encouraged to participate in the SCIA and CCA programmes, and BIMCO has been authorised to sign these agreements on members' behalf.

BIMCO has also established an arrangement with the US Customs and Border Protection that facilitates participation in the Customs-Trade Partnership Against Terrorism (C-TPAT). The C-TPAT application instructions are available on the BIMCO Website. This arrangement with

the C-TPAT programme follows the success of a similar arrangement with the anti-drug smuggling Sea Carrier Initiative Agreement (SCIA), and will similarly streamline the registration process whilst reducing members' exposure to delays and potentially mitigating fines and related penalties.

The arrangement illustrates BIMCO's continued commitment to working with the USCBP on maritime security concerns.

There are several advantages for members participating in the C-TPAT arrangement via the BIMCO Secretariat, such as reduced exposure to security-related delays at US ports, training provided by USCBP staff, and streamlined contact points with the USCBP.

ISPS Database

BIMCO is concerned that port facilities fulfil their obligations by implementing the measures stipulated in the SOLAS ISPS Code. Port facilities that fail to meet their obligations will represent the weak link in the maritime security chain. Therefore, reports from ships trading to port facilities that describe such deficiencies should be submitted to the BIMCO Secretariat in order to enable BIMCO to take appropriate measures either directly with the port concerned, the Coastal State or at the IMO. Information received is made available from the BIMCO ISPS database in an anonymous form.

In order to facilitate the reporting of ISPS Code-related difficulties at port facilities to BIMCO, a special reporting form has been included in the Additional section under SOLAS ISPS Code. It is also available on the BIMCO Website (*www.bimco.org*) in the Members Area under Marine operational/Reporting Forms.

Security acronyms

The SOLAS ISPS Code introduced many new terms and related acronyms; a list of the main terms follows for easy reference:

Abbreviation	Meaning
ASE	Annual Security Evaluation
CG/DA	Contracting Government / Designated Authority (interrelated)
CSR	Continuous Synopsis Record
CSO	Company Security Officer
DoS	Declaration of Security
ISPS	International Ship & Port facility Security
ISSC	International Ship Security Certificate
IISSC	Interim International Ship Security Certificate
RSO	Recognised Security Organisation
PFSP	Port Facility Security Plan
PFSO	Port Facility Security Officer
SSO	Ship Security Officer
SSA	Ship Security Assessment
SSP	Ship Security Plan
SL	Security Level

BIMCO's Benefits

BIMCO: The information you need, when you need it

BIMCO's activities range from the development of standard shipping documents to providing practical advice and consultancy, round-the-clock on-line access to data banks, development of shipping software systems and publication of news and articles on the state of the shipping industry.

BIMCO speaks for the shipping industry, defending its interests and highlighting the importance of shipping to the development of world trade.

BIMCO serves as a forum where people in the industry can meet and debate issues of common interest.

The backbone of BIMCO's strength is the active participation and support of its members, the Executive Committee, the Board of Directors and the Documentary Committee. All BIMCO officers are leading personalities within the shipping industry.

BIMCO's members include many different types of companies and institutions involved in international shipping, divided into six categories:

- **Owner-membership**, for shipowners, ship managers and operators of ships;

- **Broker-membership**, for shipbrokers;

- **Agency-membership**, for port agents;

- **Club membership**, including P&I Clubs, Freight, Demurrage and Defence Associations and National Shipping Associations;

- **Associate membership**, including companies and organisations having an interest in international shipping, e.g. classification societies, banks, insurance companies, and maritime lawyers.

- **Associate membership for Educational Institututions**, an attractive offer for universities and other educational establishments.

Information and assistance

BIMCO offers a range of unparalleled complimentary services to our members, handling approximately 14,000 enquiries from members per year. BIMCO is at your service with know-how, information, assistance, guidance, recommendations, warnings and intervention at any stage of a transaction. Our experienced shipping staff provides solid, practical information and advice with a minimum of delay.

Many readers will already know the staff through their day-to-day contact with BIMCO. The staff's expertise is backed by:

- A unique database on port conditions;

- A network of correspondents around the world who regularly supply information on new developments and/or respond to questions on specific subjects or requests to update material;

- An extensive file on charter party disputes, related legal material and arbitration awards;

- The BIMCO Notices to Members on non-payers and/or defaulting business partners;

- Constant feedback and daily contact with members;

- Conventions, handbooks, manuals, periodicals - some of which are not readily found in the offices of members.

Prepare your cases

Whenever members approach the Secretariat, we request that the Membership Registration number is given. Members are asked to contact the Secretariat solely under the style that is registered with BIMCO and to avoid submitting enquiries under styles of affiliated or related companies that cannot be identified as members. Moreover, members who wish to avail themselves of BIMCO's services are kindly requested to bear in mind that fast and efficient handling of enquiries about disputes is only possible if the cases are properly prepared by members.

It is therefore essential that points of dispute or differences of opinion are briefly outlined and that BIMCO is furnished with relevant documentation, e.g. Charter Party, Statement of Facts and so on. Whenever enquiries are made, it is important to state whether the governing contract contains an arbitration or jurisdiction clause and where arbitration or possible court proceedings would take place.

Keep us informed

It is also of considerable help for future cases when members who have consulted BIMCO inform BIMCO of the outcome of the dispute in question. In addition, inform BIMCO whenever your company is facing unfair treatment. We often raise such matters with local authorities, generally where individual members would otherwise jeopardise their future relationship with the authority concerned. Lastly, report your port disbursements experiences to the Services Department, so that our files are constantly up-to-date.

Contracts

BIMCO standard documents are a first defence against disputes. BIMCO will recommend the proper forms and clauses and warn against pitfalls. Articles in the *BIMCO Bulletin* give members valuable information about judgements, legal trends and arbitration awards.

If, for instance, a shipowner is presented with a charter party clause with which he is not familiar, BIMCO can provide an interpretation and opinion of the possible consequences of accepting the clause. BIMCO also warns against objectionable or risky charter party clauses.

The benefit of such services may quickly exceed the membership fee and prove to be invaluable in avoiding costly disputes.

Contract related guidance is available in the following areas:

- Comments on terms offered;
- Warnings about objectionable terms;
- Advice on the interpretation of clauses;
- Assistance in disputes;
- Explanations of applicable principles;
- Comments on the possibility of placing lien on cargo in different ports;
- Scanning of judgements, legal trends, arbitration awards.

Reference checks

BIMCO encourages members to ask for information on the standing and repute of prospective business partners before committing themselves, thus avoiding potential problems. BIMCO has access to a wide range of information from which members can be supplied with background information on new and prospective business partners.

The BIMCO Secretariat also maintains a close relationship with the International Maritime Bureau (IMB) in London whenever there are indications of fraudulent activity.

In order to ensure a prompt and accurate reply, members are urged to forward the full name and address of the company about which they are enquiring. Moreover, members should bear in mind that offshore companies should be considered as mere contractual partners and that the integrity of the person(s) or company controlling the offshore company is the key to a successful business relationship.

The Secretariat is fully committed to warning members of companies and individuals who in the past have failed to honour their contractual obligations. However, such information is supplied on a strictly confidential basis and is not to be disclosed to other parties.

Of those preventative measures that are available, there is no substitute for ordinary business prudence. This is especially true when dealing with unknown or new business partners. A check or re-check of their trading record and/or general reputation could prove to be well justified.

BIMCO's influence, or ability to intervene in order to press the defaulting party into paying should not be over-estimated and certainly should never be considered as an alternative to prudent business practice, nor as the ultimate "safety net".

Intervention

The phenomenon of the defaulting business partner has been an unfortunate reality throughout the history of maritime trade. The present worldwide economic climate, as well as the development of modern information technology, creates an environment in which shipping companies, and businessmen in general, are more likely to be affected by fraud and defaults.

A member owed money, be it an owner having problems getting payment for freight or demurrage or an agent having difficulties in recovering his outlays or commissions, can ask BIMCO to intervene on his behalf with a view to retrieving the outstanding balance, provided that the unpaid balance is **undisputed**. Through its intervention, BIMCO helps members to recover an estimated USD 2.5 - 3.5 million a year.

To use this service, members should forward a report by e-mail, fax or letter, describing the problem encountered and enclosing supporting vouchers showing the nature of the outstanding. Upon receipt, BIMCO will approach the counterpart on behalf of our member with a view to obtaining settlement. Should the undisputed balance remain outstanding, BIMCO will issue a Notice to Members, describing the nature of the default and listing both the defaulter and the wronged party.

In 2005, BIMCO reported 44 companies in the BIMCO Notices to Members. A searchable database containing all BIMCO Notices to Members issued in the last five years is available in the Members area of the BIMCO Website, making it possible 24 hours a day to check whether a company has been reported. Make use of the database and previous circulars as a checklist before entering into transactions with unknown partners and/or contact the Secretariat for additional information. An index of the defaulters reported during a given year will be mailed to members in January of the following year.

Occasionally, the BIMCO Secretariat receives requests to intervene as a debt collector, i.e. in the case of nominal outstanding amounts (under USD 100), or in cases where a member has not fully pursued his own possibilities to collect the outstanding balance. There are limits to BIMCO's capacity in this context and we must appeal to members to bear in mind that BIMCO's intervention must be applied with discretion and as a "final recourse" if it is to retain optimum effectiveness.

Unfortunately, sometimes both the wronged party and the wrongdoer are members of BIMCO. In this context, members should be aware that, without inhibiting commercial ingenuity, certain qualities are indispensable and must be upheld. If BIMCO's appeal for corrective measures is ignored, the Secretariat may have no alternative than to report the default to the Executive Committee. Reference is made to the following excerpt from Rule 7 of the Rules of BIMCO:

> "The Executive Committee may, after 28 days' notice to the member of its intention to do so, and without stating any reason, cause a member's name to be removed from the Register of Members, and thereupon such member shall cease to be a member of BIMCO. Any such action shall only be taken pursuant to a resolution passed at a meeting of the Executive Committee.
>
> An appeal against any such removal may be made by the member within 28 days from the date of the notice from the Executive Committee, and in this case the removal shall not take effect unless and until the action of the Executive Committee shall have been either confirmed by a resolution passed at the next meeting of the Board of Directors by a majority of those present and entitled to vote, or approved in writing by the majority of the members of the Board of Directors.
>
> Any member removed from the Register of Members shall nevertheless be liable to pay to

BIMCO on demand such sum as the Executive Committee may declare to be due up to and including the date of such removal, and such former member shall no longer be entitled to display the BIMCO Crest."

Unpaid disbursements
Many cases handled by the BIMCO Services Department concern unpaid freight, demurrage and unreturned balance of advances for disbursements. There are, however, also cases in which the Services Department helps port agents who have been left high and dry with unpaid disbursements.

A pattern has been observed where the party, who to all intents and purposes appears to be the port agent's Principal, says "Sorry - not ours, we are merely an agent" when it is time to pay.

Members acting as port agents are therefore reminded that the BIMCO Secretariat supports their justified and reasonably assessed requests for advance funds or other steps aimed at obtaining security for payment. These members should at the outset demand confirmation that the party contacting them is acting as Principal and thus liable for payment. BIMCO assistance after the event can never be a substitute for such precautions.

Arbitration awards disregarded
There are cases where the party directed to pay disregards an arbitration award, although a contractual agreement to settle disputes by arbitration was voluntarily made. Sometimes these parties feel that they can remain unpunished under the laws of their country of domicile, which do not recognise arbitration awards rendered in another country. BIMCO keeps track of these parties, reports on them and guides members accordingly if they are careful enough to enquire about the particular company before committing themselves.

A case in point
Methods used by some parties are illustrated in the following case that started as a dispute in which the BIMCO member's opponent argued that:

"...BIMCO is an association of owners" and that they did not feel bound to accept BIMCO's advice.

Adding:

"In case owners are not prepared to negotiate and decide to call for arbitration, we as brokers would suggest that they check whether it is better for them to call for arbitration or to sue charterers ..... in court, because we understand that it might be difficult to enforce a London arbitration award in ....."

BIMCO advised the member:

"It may very well be that there might be difficulties in enforcing a London arbitration award in ....(similarly as, for instance, in .....) but we feel that the particular charterers are a trifle too smart, and it would do no harm if you told them that BIMCO does report on parties who do not respect arbitration awards and would be prepared to do it also in this case (depending of course on whether the matter will be arbitrated at all). We are not so

> sure whether the charterers would welcome the publicity which our BIMCO Notices to Members would give them."

Result:

> "....charterers agent replied 'we finally convinced charterers to pay extra demurrage required by owners.' After a further reminder sent to charterers, the outstanding demurrage has been received."

This proves that resolute action pays off.

Assistance to ease your daily tasks

Ports
BIMCO provides its members with a wealth of information on ports, including up-to-date conditions, tariffs and charges, cargo regulations, labour situations, working hours, examples of disbursement accounts, facilities, freight taxes and navigational limitations. BIMCO's members are continuously contributing to this indispensable pool of worldwide information.

The Sea Carrier Initiative Agreement (US)
Following the Voluntary Agreement of Co-operation between the US Customs Service and BIMCO, signed in September 1988, BIMCO may sign the Sea Carrier Initiative Agreement (SCIA) on behalf of an owner who is committed to following the SCIA guidelines. Owners who are signatories to the SCIA are provided with a Letter of Confirmation that the owner is a signatory to the Agreement and the following three documents issued by the US Customs Service:

- Copy of the Sea Carrier Security Manual,
- Copy of the Contact List for Carriers, and
- Copy of the Drug Smuggling Risk Levels of Geographical Areas.

Owners are urged to keep a copy of each of the above documents on board their ships. When entering a port in the United States, the Master should show the Customs Authorities the BIMCO letter confirming the owners' participation in the Carrier Initiative Programme.

Readers are referred to the various articles on the above subjects and to the US Anti Drug Abuse Act 1986 Clause for Time Charters as drafted by the BIMCO Documentary Committee, which appeared in the BIMCO Bulletin during 1989 and 1990. The full text of the 1/91 version of the Sea Carrier Initiative Agreement (SCIA) can be found in BIMCO Bulletin 2/91 and on the BIMCO Website at *www.bimco.org*

Participation in the SCIA is open to BIMCO owner members. Members wishing to participate in the programme should contact the BIMCO Security and International Affairs Department for further information. The SCIA programme remains active and open to BIMCO members also in 2007.

C-TPAT
BIMCO has also established an arrangement with the US Customs and Border Protection

(USCBP) that facilitates participation in the Customs-Trade Partnership Against Terrorism (C-TPAT). The required application instructions are available on the BIMCO Website. This arrangement with the C-TPAT programme follows the success of a similar arrangement with the anti-drug smuggling Sea Carrier Initiative Agreement (SCIA), and will similarly streamline the registration process whilst reducing members' exposure to delays and potentially mitigating fines and related penalties.

The arrangement illustrates BIMCO's continued commitment to working with the USCBP on maritime security concerns.

There are several advantages for members participating in the C-TPAT arrangement via the BIMCO Secretariat, such as reduced exposure to security-related delays at US ports, training provided by USCBP staff, and streamlined contact points with the USCBP.

Customs Cooperation Agreements To protect the free movement of innocent cargo, BIMCO signed Customs Cooperation Agreements (CCA's) with fourteen customs authorities in Europe and North America. These programmes, similar to the US SCIA, commit owners to implement agreed security measures on board their ships. In return, participating ships receive fair treatment should drugs be discovered in spite of the security measures. This may allow the ships to sail from port without or with only a minimum of delay, avoiding detention or arrest.

BIMCO is heavily involved in the work on establishing standards for Secure Supply Chains in the World Customs Organisation (WCO, the ISO and in the IMO.

BIMCO's efforts at the International Maritime Organization (IMO) led to the institutionalisation of the MOU concept to prevent illicit drug smuggling on board ships as a new chapter to the IMO Facilitation Convention. This chapter encourages all IMO member States to establish co-operation agreements with the shipping industry, while ensuring the confidentiality of information provided by the trade and the use of risk analysis in control efforts.

Piracy and armed attacks on shipping

Members are well aware of the many articles that have been published in the BIMCO News and the BIMCO Bulletin relating to the increasing number of attacks by pirates. BIMCO is constantly monitoring the problems and warning its members of the potential risk. It is encouraging to note that a high number of the attacks have been foiled because of the crew's awareness.

BIMCO plays a key role in ensuring that piracy and armed robbery is adequately addressed at the International Maritime Organization. Represented at the IMO's Maritime Safety Committee and regional seminars and workshops sponsored by the IMO, BIMCO ensures that the concerns of the shipping industry are addressed and incorporated within IMO guidelines and related instruments. Having established the Informal Group on Maritime Security at IMO, BIMCO created a forum in which IMO delegations can share ideas and co-ordinate initiatives concerning issues of maritime security and how to best seek solutions at the IMO and elsewhere.

Over the past years, BIMCO has noted an increasing number of armed attacks on commercial vessels. Owners are recommended to advise their ship's command that a high degree of secu-

rity should be implemented when on the roads and alongside berth in piracy prone areas. If possible, it is recommended to avoid anchoring close to the port. BIMCO has published reports of numerous attacks on merchant shipping off Somalia, and we continue to do so at the number of attacks fluctuate with the power battle amongst the local warlords.

Stowaways
The pursuit of internationally binding regulations aimed at reducing the frequency of stowaway boardings and facilitating the timely removal of stowaways from merchant ships was achieved in part via efforts made by BIMCO at the IMO's Facilitation Committee. By presenting reports received from BIMCO members to the IMO, BIMCO can justify calls for action based on factual evidence illustrating the extent of the problem.

BIMCO is aware of the increase in the number of stowaways trying to escape from West and North African countries to Europe. BIMCO strongly recommends implementing strict access control and the performance of thorough ship searches prior to departure from port.

To land "illegal immigrants" can be very costly. In any event, the owner's P&I Club should immediately be informed if a vessel has stowaways on board. If difficulties arise, BIMCO can assist by making direct interventions with the immigration authorities.

ISPS
BIMCO maintains a database on the web with ISPS reports from members' vessels. The reports describe ISPS performance at port facilities as perceived by BIMCO Members and submitted using the respective Reporting Form. Members are encouraged to continue submitting such reports in order to enhance the coverage and quality of this database.

Check and re-check

BIMCO will continue to assist members energetically in the future, but please help yourself by checking and re-checking on your prospective business partner. Ask for full company background, including commercial references, when in doubt. Last, but not least, contact BIMCO at an early stage if you sense that the party due to pay is on the point of joining the ranks of non-payers.

BIMCO's Notices to Members do not become obsolete - they act as a danger signal that should never be ignored.

In conclusion, we sincerely hope these recommendations will aid members in their commercial dealings and encourage the use of BIMCO Services as an essential safeguard. In short - prevention rather than cure!

Marine Department

The BIMCO Marine Department provides services to members on matters requiring the expertise of master mariners and naval architects. These services to members are provided either through direct consultancy work carried out following specific inquiries from specific members, through the dissemination of relevant information of general interest in articles in the dedicated BIMCO publications and website, or through BIMCO representing the views of the

members in the rule and policymaking fora, such as the International Maritime Organization (IMO), EU and US Coast Guard (USCG).

Standards developed by the International Maritime Organization are essential to the industry's efforts to operate safely and to prevent pollution at sea. Conventions agreed under the auspices of IMO must be applied universally if they are to be fully effective and BIMCO is a firm supporter of IMO's efforts. BIMCO is involved in IMO's committees and working groups, looking after the interests of shipowners and ensuring that new regulatory instruments can be implemented in a cost-effective and practical manner, with a minimum of interference in shipboard operations.

BIMCO supports the aims of the Paris Memorandum on Port State Control, as well as the other regional MOU's that have emerged in recent years, as an instrument to identify serious deficiencies on board ships, but sees efficient flag state administrations as a more important instrument to ensure compliance with mandatory instruments.

It is commonly said that if the flag states fully lived up to their responsibilities, port state control would be superfluous. BIMCO therefore supports IMO's endeavours to secure flag state compliance, but acknowledges until that time, the maritime industry must accept the existence of Port State Control. The various MOU's should ensure that the IMO guidelines on PSC are implemented and enforced globally so that ships are treated equally and fairly in all ports.

The Revised International Convention on Standards of Training, Certification and Watchkeeping (STCW Convention) 1995 is the only international convention governing standards of crew competence at different levels i.e. management, operational and support. The Revised STCW Convention contains a number of requirements, such as mandatory minimum rest hours, enforcement of shipboard familiarisation before assignment of on board duties and validation of the seafarers' certificates and endorsement of certificates. BIMCO is taking part in the continuous work on the Revised STCW Convention.

When it became apparent that the shipping industry may face a fundamental shortage of well-trained officers and ratings, a study was commissioned jointly by BIMCO and the International Shipping Federation (ISF). The study has led to a debate on ways to attract qualified personnel to a seagoing career. The latest ISF/BIMCO Manpower Report was published in December 2005.

The International Convention for the prevention of Pollution from Ships (MARPOL) prescribes the establishment of shore-based reception facilities for garbage and slops. Unfortunately, these facilities are often lacking and, where they are available, costs are sometimes counter-productive to the intentions of the Convention. BIMCO is gathering reports on the availability and cost of reception facilities, in order to highlight deficiencies.

No port would, for whatever reasons, deny a ship the use of a tug, or a pilot, or a crane, or a bollard to tie the ship up, and it can be reasonably argued that adequate reception facilities are as essential to the safe and environmentally friendly operation of ships as any of these items. A Master can be fined heavily for failure to comply with the environmental provisions of all manner of national laws and he deserves all the help he can get to fulfil his obligation under MARPOL.

BIMCO also collects information on other ship/shore related issues, such as cargo handling at bulk terminals, cleanliness requirements for cargo holds and cargo tanks, and the behaviour of vetting inspectors and PSC Officers.

Unilateral legislation implemented by various countries may impose additional technical and cost burdens on shipowners. BIMCO thus emphasises the necessity of rules and regulations for the maritime industry being made and adopted by an international body, i.e. the IMO, rather than being made on a national or a regional basis. However, a number of such unilateral rules do exist, such as the requirement for Vessel Response Plans under the US Oil Pollution Act 1990.

BIMCO guides members on technical requirements under various national maritime regulations and members may also draw on BIMCO for assistance with technical aspects of shipping.

BIMCO strongly encourages a constructive dialogue with members and the sharing of information. A number of reporting forms have been introduced to facilitate the process of gathering information from members. The information from these reporting forms is available in databases, which can be accessed on the BIMCO Home Page (*www.bimco.org*).

It is BIMCO's objective to provide the services usually handled by a marine superintendent, with the exception of the actual operation and inspection of ships.

Information technology

Information day and night from BIMCO's Internet Home Page

http://www.bimco.org

Members of BIMCO can access a large number of shipping databases around the clock. The databases include:

Agency Fees - Mandatory scales of agency fees and list of countries where agency fees are subject to negotiation or where recommended scales of agency fees are issued

Ballast and Sewage - Information on international, regional and national regulations concerning discharge of ballast and sewage,

BIMCO Bulletin - Members can either download the entire BIMCO Bulletin in PDF format or read the individual articles as text.

BIMCO News - The on-line BIMCO News digest,

BIMCO Standard Charter Party Clauses,

Bulk Terminal Reports - Reports from vessels on their experiences using bulk terminals around the world,

Chartering/Operation - FAQ's on charter party problems and BIMCO's answers,

Cost Related Advice - Guidance and information on special charges,

Freight Taxes - A database providing particulars on the taxation of freight world-wide,

Holidays and Working Hours - In ports round the world,

Ice - Information on actual ice conditions in most areas where commercial shipping navigates during the Winter season. This area also gives general advice and guidance on ice navigation in specific areas as well as an ice glossary and recommended ice clauses to be used in charter parties.

ISPS Database - Compliance assessments for port facilities and PFSO details,

Load Line Zones,

Marine Operational - Briefs on various IMO conventions and other regulations affecting shipping,

Membership Directory,

Notices to members - Details on parties' failures to meet contractual obligations,

Port Cost Estimator - Calculates estimated port expenses in a large number of ports round the world.

Reception Facilities - Information on facilities to receive liquid and solid garbage in ports,

Repair Facilities - Information and contact details on repair facilities,

Ship's Security - How to avoid drug smuggling, stowaways and piracy, and information on how to deal with such problems,

Shipping Documents - Draft copies of BIMCO documents and forms and Explanatory Notes,

Solid Cargo Database - Information on some 130 commodities transported by sea,

Trading Restrictions - Detailed information on all known boycotts and other trading restrictions affecting international shipping,

V.A.T. - Information on how value added tax is applied,

Warranties Limits,

World Ports - Detailed information on ports and terminals round the world,

More databases are added regularly.

BIMCO's *idea*

BIMCO's *idea* - ***i***nternet ***d***ocument ***e***diting ***a***pplication: An Internet based tool for editing and

negotiating shipping documents, launched in August 2001. At the time of going to press, the editor includes 52 major BIMCO forms and 19 third-party forms which allows the user to create, edit, retrieve documents and print perfect copies every time.

The documents may be accessed from any Internet connected workstation in or outside the office, and the documents may be exchanged via e-mail without loss of quality. Free trial accounts are available by signing up on www.bimco.org.

Please contact Sales@bimco.org for more information.

BIMCO's Publications

Information and guidance on practical shipping issues has always been a cornerstone activity for BIMCO. Through its subsidiary, BIMCO Informatique A/S, a collection of highly specialised publications is made available on issues relevant to anyone engaged in day-to-day shipping operations.

Covering issues from security to new and revised shipping documents approved by BIMCO's Documentary Committee, BIMCO's membership publications keep members abreast of developments fundamental to their businesses.

A range of popular manuals with practical advice on day-to-day shipping problems is also published by BIMCO. Produced for everyday use by practitioners engaged in international shipping, BIMCO's publications offer concise guidance on a wide variety of practical shipping issues. They include:

BIMCO Bulletin
A specialised magazine, filled with features of lasting value. Articles on developments affecting international shipping, including reports from IMO and other regulatory authorities, keep readers abreast of new conventions and legislation.

The regular publication of legal decisions and arbitration awards on charter party disputes, new and revised BIMCO documents with full explanatory notes, market trends, port information and new tariffs and other practical shipping information, makes the BIMCO Bulletin a highly valued source of information. The Bulletin is produced six times per year, and BIMCO members receive it free of charge. It is also available to non-members on a subscription basis.

BIMCO's Guide to Prepare for Port State Control Inspections in the USA
In an effort to enhance compliance with MARPOL and SOLAS requirements and thereby reduce the frequency of related violations at US ports, BIMCO has developed a Guide to prepare for Port State Control Inspections in the United States.

Two versions of the guide are available for download free of charge, one a high-resolution PDF file for quality printing purposes and the second a low-resolution PDF version that will facilitate quick transmission via e-mail to ships. A Link to download the high-resolution version can be found at: http://www.bimco.dk/upload/us_psci_folder_high.pdf.

The Link to download the low-resolution version can be found at: http://www.bimco.dk/upload/

us_psci_folder_low.pdf. Ship operators will be able to use the high-resolution version to arrange for printing of the guide in customised versions using space allocated to display company details and logos.

BIMCO Holiday Calendar
Detailed lists of general holidays in over 150 coastal states, plus local holidays and working hours in more than 700 ports around the world make the Holiday Calendar an essential publication when computing laytime, fixing vessels, planning voyages in liner trades, and planning trips. BIMCO members receive one Calendar annually free of charge. It is also available for purchase by non-members.

BIMCO/MARTECMA Bulk Carrier New Building Specification Guide
This Guide offers tangible advice on a large number of issues to be taken into account before and during the newbuilding process, e.g. how to read a newbuilding contract; steel qualities; hull outfitting and coating specifications. It is a valuable tool in the shipowner's negotiations with the shipbuilder - and an essential handbook for the shipowner's on-site representative.

BIMCO Special Circulars
Issued whenever necessary, Special Circulars inform members of new and revised charter parties, demurrage scales, urgent information and reports of interest to the industry.

Check before Fixing!
A useful manual for quick reference when negotiating fixtures. A new edition is published every second year. Check before Fixing! is available to both members and non-members. Members enjoy a substantial discount on the purchase price.

Forms of Approved Documents
Contains specimens of all BIMCO approved charter parties, Bills of Lading, waybills and other shipping documents, plus the wording of numerous standard clauses ready for inclusion in charter parties. This A4 binder is the most comprehensive collection of shipping documents available. The publication is updated at the end of each year with copies of new and revised documents approved by BIMCO's Documentary Committee. New indexes are issued each year. Available to both members and non-members. Members enjoy a substantial discount on the purchase price.

Freight Taxes
A concise publication explaining shipowners' exposure to various income tax regulations. Freight Taxes features summaries of tax rates and regulations, lists of ratified double taxation avoidance agreements, and related charterparty clauses. The manual is updated annually. Freight Taxes is available to both members and non-members. Members enjoy a substantial discount on the purchase price.

ShipMaster's Security Manual,
Designed for use on board the vessel, the ShipMaster's Security Manual provides precise, practical, and easily accessible information for those forced to confront security problems on a daily basis - ships' personnel. The manual contains details methods of preventing stowaways, drug smuggling, piracy and armed robbery, and suggestions on how to respond . The manual also covers the International Maritime Organization's Advice and Guidelines. The

ShipMaster's Security Manual is available to both members and non-members. Members enjoy a substantial discount on the purchase price.

Standard shipping documents

One of the fundamental activities of BIMCO is the development of charter parties, bills of lading, individual clauses and other shipping documents for commercial use. BIMCO's standard forms have gained world-wide recognition for their clarity, equity and quality of draftsmanship. The expertise used to develop the wide range of approved standard forms is drawn largely from BIMCO's own membership who makes a vital contribution to the work of the Documentary Committee and the numerous associated sub-committees in this field.

BIMCO Courses

BIMCO Courses arrange the following types of courses:

Courses
- Educational events focusing on one broad topic.

Seminars
- Events addressing a wider range of topics.

Conferences
- Events addressing a specific segment of the industry.

And in addition, the following types of special courses:

BIMCO's Summer Shipping School
This course, held for the first time in July 2002, is intended as a recurring event, taking place in Copenhagen during a full week in June and July. The course combines workshops and lectures to provide participants with an in-depth knowledge of the commercial aspects of shipping, its problems and their solutions.

Fully residential, this course aims at attracting young people with limited knowledge of the shipping industry from all over the world for a week of lectures and workshops. The course is an excellent way of obtaining invaluable business contacts and friendships through the workshops and social activities.

BIMCO has now expanded the course into the Far East. The first BIMCO Asia Shipping School was held in Singapore in February 2006.

For educational reasons, the number of participants for both courses will be limited.

BIMCO Masterclass Workshops
This concept consists of six modular workshops focusing on key aspects of maritime commerce: Dry Cargo Laytime and Tanker Laytime, Bills of Lading, Time Charter, Agency and Sale & Purchase. The workshops will provide participants with a thorough grounding in the principles and pitfalls of each core subject.

The workshops are designed for participants who already have some shipping experience and who wish to broaden their knowledge of the industry. As such, the workshops are well suited to the development of existing and future decision makers who require a solid grounding in the mechanics of modern commercial practice.

Each workshop in the series consists of three full days of presentations by industry experts, combined with group discussions and case studies. Participants are expected to and will be encouraged to contribute actively to the group discussions. At the end of each workshop, participants may take a short "open book" exam to assess their level of understanding of the subject matter. This assessment leading to the award of a BIMCO diploma will be of value to employers and employees alike in demonstrating the effectiveness of the training and knowledge attained.

For educational reasons, the number of participants for both courses will be limited.

Shipping Law: From Alpha to Omega
This seminar takes participants through the legal relationships that a shipping company develops from inception to dissolution and will follow the life of a vessel from purchase to scrapping using real-life examples and actual documentation.

While the multitude of subjects will be covered in a relatively short space of time, the seminar will go beyond a mere introduction to the issues raised and will provide perspective and context to every aspect of the life of a shipping company.

To obtain further information on BIMCO Courses go to *www.bimco.org* - click BIMCO Courses or contact courses@bimco.org

Joining BIMCO

If you are not already a BIMCO Member, and therefore do not have access to all of the services specified here, please contact Sales@bimco.org for more details on the many benefits of a BIMCO membership.

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